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STATE OF INTINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1945

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Term No. 4305

THE FIRST NATIONAL BANK OF JONESBORO, ILLINOIS, a corporation,

Plaintiff-Appellee,

vs.

ROAD DISTRICT NO. 8, UNION COUNTY, ILLINOIS,

Defendant-Appellant.

and

THE CLEAR CREEK DRAIMAGE AND LEVEE DISTRICT, UNION AND ALELANDER COUNTIES, ILLINOIS, THE PRESTON LEVEE AND DRAIMAGE DISTRICT, UNION COUNTY, ILLINOIS, ROAD DISTRICT NO. 10, UNION COUNTY, ILLINOIS AND ROAD DISTRICT NO. 11, UNION COUNTY, ILLINOIS, ILLINOIS, ILLINOIS, ILLINOIS, ILLINOIS,

DeFendants-Appellees

Agenda No.

Appeal from the

Circuit Court of

Union County

328 I.A. 22

STONE, P. J.

This is a suit in equity brought by The First National
Bank of Jonesboro, Illinois, a corporation, Plaintiff-Appellee
against Road District No. 8, Union County, Defendant-Appellant,
and The Clear Creek Drainage and Levee District, Union and
Alexander Counties, The Freston Levee and Drainage District, Union
County, Road District No. 10, Union County, and Road District No.
11, Union County, Defendants-Appellees, to determine what disposition should be made of the sum of \$3,521.48 in the First National Bank of Jonesboro, in an account entitled "Road District No. 8,
Drainage Fund." The bank sought to restrain Appellant, Road
District No. 8 from proceeding with the prosecution of a suit at
law, involving this sum of money, and prayed for a decree determin-

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ing the ownership of said fund and directing disbursement. All of the various claimants to the fund were made parties defendant.

The facts out of which the controversy arose are set forth in the second amended complaint and admitted by all the parties to the suit. The Appellant, Road District No. 8, in the years 1915 and 1916 levied against the taxable property in the district the respective sums of \$2500.00 and \$1500.00, for "ditching to drain roads". The proceeds arising from the collection of the said taxes, amounting to the sum of \$2124.19 were segregated from the other funds of the district and by it on June 9, 1920 deposited in the special account above mentioned, which with an accumulation of interest thereon now amounts to a total sum of \$3,521.48. Prior to the levy and collection of said taxes, the appellee drainage districts and the Miller Pond Drainage District had levied against the said Road District No. 8 special assessments for benefits to the roads of said district by the drainage improvements constructed by the said drainage districts.

Subsequent to the levy and collection by Road District No. 8 of the taxes deposited in the above special account, there have been created by the county board of Union Count, appellees Road District No. 10 and Road District No. 11, each of which includes within its boundaries territory formerly constituting a part of Road District No. 8.

On October 24, 1941 a final decree was entered permanently enjoining the suit at law, and fixing the amount due the Clear Creek Drainage and Levee District at \$1,828.17; and Preston Levee and Drainage District at \$1,359.64; Road District No. 10, \$531.39 and Road District No. 11, \$1,002.06; that the total exceeded the amount of the fund in question; that after the payment of costs the fund be apportioned to these parties, and that distribution be made by the bank accordingly. Road District No. 8 perfected an appeal to the Supreme Court of Illinois, and that Court holding

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that there was no question involved which would give that Court jurisdiction on direct appeal, the cause was transferred to this Court. First National Bank of Jonesboro vs. Road District #8, 382 Ill. 508. The appeal being dismissed by this court, (First National Bank vs. Road Dist. #8, 322 Ill. App. 293) and appeal being thereafter again prosecuted to the Supreme Court, and cause being remanded to this court, with directions to consider the assignments of error raised in the Supreme Court (First Nat. Bank vs. Road Dist. #8, 389 Ill. 156), the case comes again for consideration by this court.

In a brief of 264 pages, appellant alleges 42 errors relied upon for reversal of the finding, orders, jud ments and decrees of the trial court. While a party has an undoubted right to make or file all necessary assignments of error, he should not increase their number unnecessarily. The practice of filing interminable or unnecessary assignments has been repeatedly disapproved by the courts and it has been said that "such interminable assignments, instead of impressing the court with the thought of an imperfect trial, rather cast discredit upon the worth of any of them". Chicago Great Western R. Co. vs. McDonough, 161 Fed. 657. While not adhering in its entirety to that theory, this court will endeavor to consider only the questions which, in its opinion, seem to be material to the judgment. Not all of the 42 assignments of error need be discussed separately.

The first fifteen assignments of error attack the rulings of the court made on questions of law raised by the pleadings. Out of a maze of voluminous pleading, which take up 229 pages of the abstract we ascertain that by special pleas, three general defenses were offered by appellant as against all appellees, namely laches, estoppel and the statute of limitation.

The Statute of Limitation is purely legal as contradistinguished from an equitable defense. 21 C. J. 251; Totten vs.



Totten, 294 Ill. 70; whetsler et al vs. Sprague, 224 Ill. 461. Both laches and estoppel depend upon the principle that it is inequitable to enforce a ri,;ht because the party seeking to enforce the right has misled the other party and is responsible for his being in a position where he would now be greatly injured if the right were enforced. Whetsler et al vs. Sprague, supra. As to municipal corporations, the statute of limitations, laches and estopped do not apply except as to private rights, and certainly would not apply against a municipal corporation whose officers have merely failed to act. The case of Logan County vs. City of Lincoln, 81 Ill. 156, is a case entirely in point. In that case the City of Lincoln sought to recover its share of tax money collected by the County, and the county ur ed the defenses of limitations, laches and estoppel; and the Court held that none of these defenses were available. In the instant case, the acts of appellees have only been in failing to act; that is, to enforce payment from the fund in question of the obligations of appellant. There has been no arrightive act that has caused appellant to assume a position such that it would now be inequitable to require them to change.

We are of the opinion that the trial court did not err in sustaining the motion to strike the special pleas of appellant, and we find no other reversible error in any order of the court in passing upon the multifarious pleadings in the case.

The appeal in this case was taken without a supersedeas and one of the errors assigned by appellant is the refusal of the trial judge to allow appellant, a municipal corporation, to appeal without bond. The objections to the granting of a supersedeas without bond was based on the contention on the part of appellees, that the appeal was a personal venture of the counsel for appellant, and that bond should be given as in cases of individuals. The mere refusal of a party's motion for supersedeas without bond is not subject to



review unless it appears that there is a clear abuse of the descretionary power lodged in the trial court. Anderson Transfer Co. vs. Fuller, 174 Ill. 221; City of Springfield vs. McCarthy 79 Ill, App. 383; Corbly vs. Corbly, 206 Ill. App. 527; McMahan vs. Trautvetter, 305 Inl. 395. We are of the opinion that there was no such abuse of descretion in the instant case. The record discloses no effort thereafter on the part of appellant to have a bond fixed by the court.

Complaint is made by appellant as to the Court's findings as to facts. These questions seem to be presented in the assignments of errors 27 to 33 inclusive. The trial judge saw and heard the witnesses and had advantages which an Appellate Court does not possess in judging of the weight which should be given to their testimony where there was conflict. Under the law and established rules or practice the conclusions of the trial judge should not be disturbed unless it clearly appears from the record that such conclusions are wrong. City of Quincy vs. Kemper 304 Ill. 303; Kuehne vs. Malach 286 Ill. 120; Podoski vs. Stone 186 Ill. 540; wood vs. Price 46 Ill. 435; Marble vs. Marble, 304 Ill. 229.

shows that the fund in question is the result of a special levy included in the regular levy of Road District No. 8 for the purpose of paying the judgments obtained by the drainage district, the greater portion of which fund was set aside especially for this purpose and allowed to remain undistribled for more than twenty years.

Inasmuch as this fund was never used for the purpose for which it was levied and collected, and the drainage assessments for which it was levied and collected to pay, had not been paid (except those paid by the said Road Districts) the trial court, we believe properly, as an equitable matter, decreed that the remaining assessments due the Drainage Districts be paid, and the Road Districts reimbursed for the portion of the said assessment so paid by them,

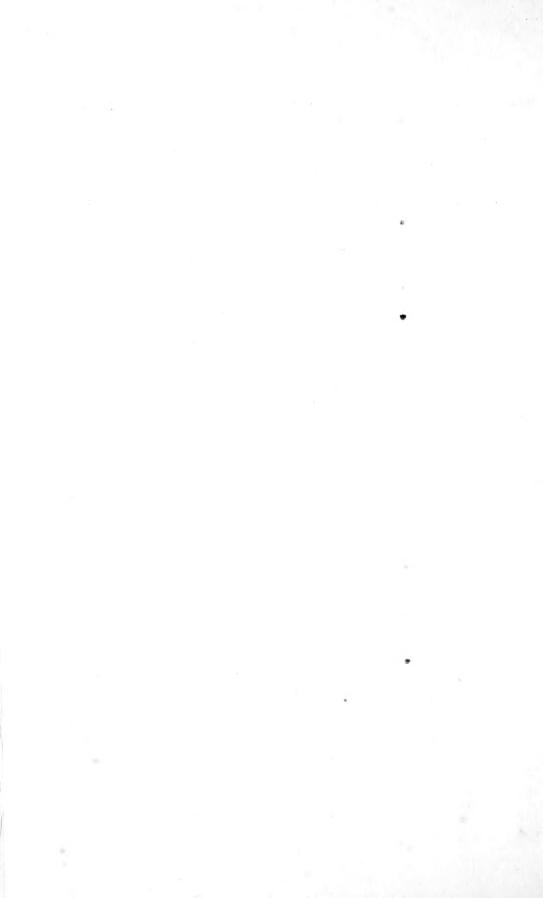


plus interest thereon; there not being sufficient money in said fund with which to pay the aforesaid amounts in Tull, the Court decreed that the same be pro rated to the said Drainage Districts and Road Districts in the ratio that the respective amounts due bears to the amount of said fund.

Assignments of error 17 to 23, inclusive, allege improper admission of evidence offered on behalf of Appellees. This includes objection to the testimony of the witness John E. Lingle, treasurer of the Preston Drainage District and also of the Clear Lake Drainage District, wherein he testified to certain records, as not being the best evidence; objection to Appellee's Exhibits 10 and 11, which were respectively Treasurer's statement regarding what his books show Road District #8 owes to Freston Drainage District; and Treasurer's statement regarding what his books show Road District No. 8 owes to Clear Lake Drainage District on the ground that these were hearsay; and the testimony of R. Wallace Karraker, attorney for Plaintiff-Appellees and for Derendant-Appellees, Drainage Districts, with reference to certain statements made by Paul D. Reese, during negotiations for a compromise of this matter.

It is well settled in chancery practice that where the competent evidence is sufficient to uphold the decree, the same will not be reversed on account of the admission of incompetent evidence, as the presumption is that the chancellor did not consider the evidence which was incompetent in arriving at his decision. Barton vs. Hayden, 199 Ill. App. 37.

In Swift vs. Castle, 23 Ill. 209, it was said by our Supreme Court; "The question presented upon the trial before the chancellor as well as in the Appellate Court, is, upon all the legitimate evidence in the cause, what decree should be rendered. The chancellor being the judge of both law and evidence, the presumption is, that in rendering his decree he will only regard that which is legal and pertinent.



chancellor, after the evidence is heard, to regard no portion of it which is immaterial or illegal, and to decide the case alone on the legal evidence adduced. It was also held in Treleaven vs. Dixon 119 Ill. 548, that "Ih chancery cases, the whole record, including all the evidence offered, is before us, and we are required to assume that all the incompetent evidence was rejected, and all the competent evidence was admitted and considered, on the linal hearing. If there is competent evidence in the record sufficient to sustain the decree, it must be affirmed; if not, it must be reversed, and this without regard to whether the chancellor may have been right or wrong in his views as to the competency of the evidence at the hearing.

we are of the opinion that there was sufficient competent evidence in this record, to justify the decree of the trial court. Finding no reversible errors in the record, the decree of the Circuit Court of Union County will be affirmed.

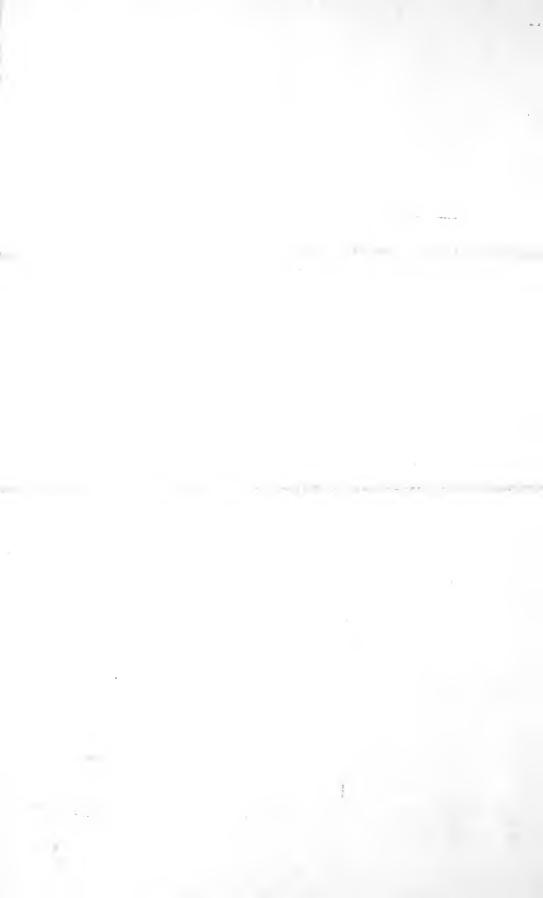
AFFIR .ED

CULBERTSON, J. and BARTLEY, J. CONCUR.

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CLERK OF THE APPLICATE COURT



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GLEN T. ROGERS,

Plaintiff - Appellee,

V .

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a corporation,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 I.A. 123

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action under the Federal Employers! Liability Act. (45 U.S.C. 51). Verdict and judgment were for plaintiff in the amount of \$30,000. Defendant has appealed.

Plaintiff a resident of Frankfort, Indiana, began to work for defendant as an extra switchman in November of 1942.

He was injured the night of April 5, 1943 in defendant s Frankfort Yard. As a result of the injury his left leg was amputated a few inches above the knee.

The Frankfort yard extends east and west for about a mile and a half. The trial was focused upon approximately 3,065 feet west of a cross track of the Monon Railroad. There are 15 tracks in the Yard. Counting from the north the first track, for most of the distance, is the "passing track." The second is the Lake Erie "main," hereinafter called the Main. The third is the "long" track. The "passing" track switches into the Main near the west end of the Yard. About 300 feet east of this switch point a cross over switch opens from the Main to the "long" track. South of the "long track" are the balance of the tracks. Further south are various railroad buildings, including the Yard office.

The Kemp Canning Factory, The Horton Oil Company building and the National Refining Company are, according to a map submitted with the briefs, respectively about 745 feet, 1250 feet and 1600

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GLAN T. ROCKES,

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THE NLW YORK, Chicker & ST. LOVID RAILSONS COMPANY, & copporation,

Defendent - Appellent.

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HR. PRESIDING JURGICS MILLY DULLY DEPOS TO DEFILDE OF ASK TOLD,

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The Kemp Ganning Factory, The Horton Cil Company building and the National Refining Company are, according to a map submitted with the briefs, respectively about 745 feet, 1250 feet and 1800

feet west of the Monon cross track. They are north of the Yard. The Horton Building is on the west side of Myrtle Street, the first north and south street west of the Kemp Factory. The Refining Company building is at the west end of the same block as the Horton Building. A driveway adjoins it on the west. The driveway is a continuation of Hammond Street the next north and south street west of Myrtle Street. The north lines of these buildings are about the same distance north of the tracks.

At the time of the accident plaintiff lived on Morrison Street which is the first east and west street north of the tracks. His home was about a block and a half west of Hammond Street.

The issues made by the pleadings were whether plaintiff when injured "was working" or was a trespasser; whether he was called for duty in interstate commerce; whether defendant's emphoyees on their way to the Yard Office customarily climbed between cars; whether any such custom was known and accepted by defendant; whether plaintiff was injured as a result of defendant's negligently starting a standing train with a violent jerk without signal or warning while plaintiff was climbing between the 12th and 13th cars after his peril was seen by defendant's brakeman, or as a result of plaintiff's conduct in trying to climb between cars of a moving train; and whether defendant owed plaintiff a duty under the circumstances.

Defendant contends the court committed error in denying its motions for directed verdict at the close of plaintiff's case and at the close of all the evidence and for judgment notwithstanding the verdict. It says there was no evidence tending to prove either that plaintiff was employed in interstate commerce at the time of the injury, or that defendant was negligent under the circumstances.

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According to plaintiff's testimony he was crossing the Yard on his way to defendant's Yard Office in response to a call for assignment to his railroad duties. He was, accordingly, at work. C. M. & St. P. R. Co. v. Kane, 33 Fed. Rep. (2) 866;

Virginian Ry. Co. v. Early, 130 Fed. Rep. (2) 548; Erie R. R. Co. v. Winfield, 244 U. S. 170; Gidley v. Chicago Short Line R. R. Co., 346 Ill. 122.

In order to come under theAct plaintiff must show that part of his duties were in furtherance of, or in some way directly or closely and substantially affected, interstate commerce. 45 U. S. C. A. Sec. 51 as amended in 1939; Thomson v. Industrial Commission, 380 Ill. 386.

Plaintiff testified that he was called to report for the 10:30 P.M. job; that he had worked on that job a great many times; that the first assignment of that crew was to change the engine on Train No. 10; that the next assignment was a like performance on Train No. 9; and that both of these were interstate trains.

Defendant says that if plaintiff was injured in the manner alleged, there was a mere expectation on his part that he would work on interstate commerce. It relies on <a href="Erie R. R. Co. v. Welsh">Erie R. R. Co. v. Welsh</a>, 242

U. S. 303, and many cases which followed its ruling, for the rule that mere expectation of employment in interstate commerce is not enough to bring an injured employee within the Act. Among others, we have read the following cases on the question whether plaintiff was, when injured, engaged in interstate commerce. <a href="Erie R. R. Co.">Erie R. R. Co.</a>, <a href="Welsh">Welsh</a>, 242 U. S. 303; <a href="Erie R. R. Co.">Erie R. R. Co.</a>, <a href="Winfield">Winfield</a>, 244 U. S. 170;

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Mease v. Reading Co., 191 Atl., 402; Reese v. Pennsylvania R. R. Co.,
180 Atl. 188; Lowden v. Industrial Commission, 367 Ill. 596;
C. & A. R. R. Co. v. Industrial Commission, 290 Ill. 599; Grand
Trunk & Western Ry. v. Industrial Commission, 291 Ill. 167; Ill. Cen.
Ry. v. Behrens, 233 U. S. 473; South Pacific Co. v. Industrial
Commission, 113 Pac. (2) 763; Ermin v. Pennsylvania R. R. Co., 36
Fed. Supp. 936; Mitchell v. L. & N. R. R. Co., 375 Ill. 545; Velia
v. Reading Co., 187 Atl. 495; Thomson v. Industrial Commission,
380 Ill. 386; Gidley v. Chicago Short Line Railway Co., 346 Ill. 122;
Labor Board v. Jones & Laughlin, 301 U. S. 1.

The State cases cited generally involve the question whether the injury came under the Workmens' Compensation Acts or the Federal Employers Liability Act. In these cases the railroads were contending the Federal Act applied. Some were decided before, and some after, the 1939 Amendment to section 51 of the Act. This amendment was enacted to liberalize the Act so as to protect employees engaged interchangeably in interstate and intrastate commerce where, at the time of the injury, part of the employee's duties directly, closely and substantially affected interstate commerce. Ermin v. Pennsylvania R. R. Co., 36 Fed. Sup. 936; Southern Pacific Co. v. Industrial Commission, 113 Pac. (2) 763.

We think discussion of the various cases read would not be helpful in deciding this point. Plaintiff, when injured, was working. Actually, he had not begun his duties. He cannot be left in a vacuum. We must say either that he was working in interstate commerce or intrastate commerce. The parties stipulated at the trial that the 10:30 crew, the night of April 5th, engaged in both interstate and intrastate commerce. On this question of law we must make the inference favorable to plaintiff. We, therefore, hold that there was evidence tending to show he was engaged in interstate commerce.

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At the trial plaintiff relied upon defendant's general negligence and violation of its Rule 16.

Where an employee is injured in a switch movement and olaims negligence through failure to give a signal, he must show that defendant's servants knew or had reason to believe that he was in a place of danger. Chesapeake & Ohio v. Mihas, 280 U. S. 102; Sumney v. Southern Railway Co., 89 Fed. (2) 437; and Fernald v. Boston & M. R. R., 62 Fed. (2) 782. Plaintiff testified that the night of the accident, after receiving the call to work, he entered the Yard and came to a freight train standing on the Main; that he spoke to a brakeman standing on the north side of the train and, according to custom and observed by the brakeman, he climbed between the cars and that, without warning, the train was moved suddenly as a result of which he was thrown and injured. We think this testimony tended to prove the general negligence.

Where an injured employee depends for recovery upon the violation of a custom or rule, he must show that he came within the custom or rule. Chesapeake & Ohio v. Mihas; Thomson v. Downey, 78 Fed. (2) 487; Reynolds v. N. Y. O. W. Ry. Co., 42 Fed. (2) 164; and Speiring v. C. E. & I. R. R. Go., 325 Ill. App. 576. Plaintiff testified that the course he followed after entering the Yard was customary for him and his fellow employees; that this custom was known to and accepted by the defendant; that defendant's rule No. 16 prescribed two short blasts of a whistle to signal the starting of a train from a standing position; that the rule was customarily complied with; and that the train was standing and suddenly moved without the whistle being blown. We think this testimony is ample to take to the jury the question whether defendant was negligent in violating rule No. 16.

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There are supplered to lighted as a lited movement of claims negligence through failure to wive a a and, and that defendant as a vente knew or has reason to be leve that as van to the place of farmer. These are & this varies, to varies, to value of the place of farmer and least of the value of the content of the might of the society, and the restrict farmer the night of the society, at the restrict the right of the society, at the restrict of the content of the conte

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On these several questions of law defendant points to testimony unfavorable to plaintiff and suggests unfavorable inferences from its cross-examination of plaintiff and from the wording of Rule 16. In deciding these questions, however, we consider only the favorable evidence and inferences.

Defendant also contends the verdict is against the manifest weight of the evidence on the questions of its negligence and plaintiff's employment in interstate commerce.

Plaintiff alleged that after informing defendant's brakeman of his purpose, he "commenced" to climb between the 12th and 13th cars of a standing freight train consisting of an engine and 75 cars and was injured when the train was started without warning. At the trial he testified that he crossed "the passing" track after entering the Yard along the west side of the Refining Building, came to the 70 car train standing on the Main, climbed through at a point about 15 or 20 cars from the engine and was injured a little west of the Refining Company. Plaintiff's attorney argued to the jury that plaintiff spoke to defendant's Brakeman Haas before mounting the train and was injured, not when the entire train was moved, but when at least the first ten cars west of Haas were moved.

Haas, according to undisputed testimony, was standing where the front cut of cars was uncoupled from the train. This point, according to the map submitted with the briefs was more than 1200 feet west of the place where plaintiff says he was injured, yet plaintiff's attorney in his argument locates plaintiff where Haas was standing. Haas stood about 120 feet east of the crossover switch where the cut of cars was uncoupled. If plaintiff attempted to go through the train, 20 cars from the engine, he would have been 10 cars to the east of Haas and not less than 800 feet west of where he said he was injured.

On these several questions of located to take to testiony unfeverable to positive and surjoins to the to inference from its cross-examination of deintif of from the wording of Rule 16. In deciding these one tions, in the favorable evidence are inference.

Defendant when companies to a verdist in a citary the manifest subject the evidence on the subtions of its well-encern and claintiffs employment in interstate a companie.

electricity of the normer, he recommended to climb between the lith one of his normer, he recommended to climb between the lith and lith cars of a standing fraight train consisting of an angine and 75 cars and was injured when the in in in was started withhout warning. At the trial he is illifted to the cross of the packing true after entering the tiral climbs the lating of the roll of the latining building, came to the 70 and train at after, on the Min, climbal through at a point about it or ID care from the ensine and selectioney argued to the jury to telephone location. Although the factories of the form the defendent's attorney argued to the jury to telephone care as defendent's brokeman base before mounting the train and see trijured, not when the entire train security, but such it least the linet ten

Hase, seconding to mois wise from the train. This where the front out of clus was decoupled from the train. This point, according to the map submitted with the brists who more than 1200 feet west of the place where plaintiff asys be wes injured, yet plaintiff's atterney in his argument lessted plaintiff where Hase was standing. Hase stood about 120 feet east of the cross-over ewiteh where the cut of cars was uncoupled. If claintiff attempted to go through the train, 20 cars from the engine, he would have been 10 cars to the east of Hase and not less than 600 feet west of where he said he was injured.

This divergence between plaintiff's allegations and proof and his attorney's argument is a serious one. Allowing for the prevailing darkness in the Yard, we still cannot reconcile the divergent theories. Where a plaintiff relies upon negligence, arising from facts which he alleges, he establishes a theory underlying his case. The case he presents to the jury should support that theory. His opponent has the right to expect such a presentation in preparing the defense. In this case, one theory was followed in proof and another in argument. Both cannot be reconciled with the evidence and physical facts. They are inconsistent with each other, If the accident happened as plaintiff's attorney argued to the jury, it could not have happened as plaintiff said it had. Plaintiff cannot have the advantage of Haas! location without the disadvantages. If he was injured where he says he was, he could not have been on the cut of cars which was moving. If he was injured in the movement of the cut of cars, he could not have been injured where he says he was. If we say that, because of his injury, he does not recall where the accident occurred, we cast a shadow over all of his In view of the distances which we have hereinbefore marked and will hereinafter refer to, we cannot be said to require undue precision. All of the defendant's employees who testified on the point, located the place of plaintiff's injury near the Canning Factory, at almost 800 feet east of where plaintiff says he was injured and more than 2,000 feet east of where plaintiff's attorney locates the injury. There is no theory that the train moved backward.

Plaintiff admitted saying in the pre-trial deposition of October, 1943 that he was injured at a point 250 yards from the Yard office as he was traveling on a line wouthwest from his home. He denied testimony of a conversation with a fellow employee after

This divergence between claintiff's aller fine and proof and his attorney's argument is a serious one. This ing for the prevailing darkness in the Yard, we still expact a cancile the divergent theories. There a nimintiff relief mon see'll case, arising from facts which he elleger, be betablished to sory under lying his case. The case he presents to the jury should out ort that theory. His coponent has the what to expect fich a presentation in preparing the defence. In this case, has thecory was followed in proof and another in argument. Buth or man be remonded with the evidence and haysian! facts, "May she incolaistent with a ch office, If the socident harpened as chaintiff's concey or and to the jury, it could not have happened as plaintier will it hat. Pluintier cannot have the juvantees of Heast locality without the biendvantaces. If he was talured where he rive he is no cald not have deen on the cut of dare which we nowing. If he we injured in the nowement of the out of care, is could not have been lighted where he says he was. If we say that, leasure of his injury, he does not recould where the zosident ossummes, we don't shader struckly of his testingny. In view of the distances which we have hardinbefore marked and will bureinsflor refer to, we cannot be raid to raquire undus precision. Wil of the defendent's employees who testified on the maint, loopted the mixee of plaintiff's injury near the exacting factory, at slanet 500 feet east of where plaintiff says he was injured and more then [,000 feet cast of where oleintiff's attorney locates the injury. There is no theory that the train moved beekvard.

Plaintiff admitted saying in the pre-trial deposition of October, 1945 that he was injured at a point 250 yards from the Yard office as he was traveling on a line wouthwest from his home. We denied testimony of a conversation with a fellow exployee after

being discharged from the hospital that he was hurt at a point near the Canning Factory, "going through" a moving train. He denied testimony of defendant's claim agent and a court reporter of a statement by him April 12th that he was injured when the moving train started to stop. He said he did not recall saying then he was not sure whether he went between the oil barns and the Canning Factory or west of the oil barns, and did not remember saying he crossed the "stock" track. This track was north of the "passing" track for several hundred feet. It began east of the Canning Factory. Plaintiff admitted at the trial that the "stock" track did not extend as far west as the path alongside the Refinery. He said he did not recall saying in the April 12th statement that the train was going west. He denied saying it was going 12 or 15 miles an hour. not recall saying he was 12 or 15 cars back of the engine, or that he was going to ride on the train just long enough to cross the track, or that one gets careless working around "that stuff", or that 10 or 12 cars had passed him after the accident.

We recognize that the credibility of witnesses is for the jury and that this question includes the consideration of plaintiff's impeachment by previous statements and testimony. There were other factual disputes such as what time plaintiff was called, and for what job, and whether he was conscious or unconscious after the accident. We need not consider these matters, however, for in view of what we have already said, the judgment must be reversed and the cause remanded since the verdict is against the manifest weight of the evidence.

In aid of a new trial we wish to point out that we see no error in the trial court's refusal to submit interrogatories Nos. 3 and 4 tendered by the defendant,

being discharged from the scrattel that he waster grand near the Camina sctory, "coing through" a morin train. A bunned e contro de drumo a bro tras o plalo ofinismotos to ymoritact statement by him appli 1 th thad no one injured when the critic til exampled to stop. We will see the error of hereight hapten the transfer of the error of the erro ours whother as int before mithe tillimental bas could be terminated or west of the bil here, this is not emabled the edt to take or the "stock" truck. This " ack we seet of the "parking" track for several hundred feet. It began and of the contine actory. Plaintiff simited at the trief that the "Froot" thore is not extend as far weet at the both slot the things, it of it will not recell eaving in the April 18th earlywest is a restrict was soing west. He denied ". ying it to coin. I or to aller an hour. Le wid not recall taying newto 18 or ld tare bed of the enthat, or hotel he was soins to ride on the reain just look enough to cross the track, or that one gets careless wering around 'tast atus', or that I to 18 cars had taseed oir ofter ric chirect,

The readquire that the aredicitity of withderes is for the jury and that this about indicate the confucerities of although imposedment by arevious state units are tertisony. Indeed at the factual disputes such as must time about the confitty and confitty and what job, and whather he see annations a nucleon attential action. We need not concider these satters, however, for in view of what we have already sold, the judgment must be reversed and the cause remanded since the verifit is a sinct the manifest weight of the evidence.

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We also wish to point out that, after plaintiff's case was in, plaintiff was given leave to amend his complaint so as to make more specific subparagraph 11 (b). After all the evidence was in and the instructions were under discussion, plaintiff's attorney in objecting to instructions offered by defendant as to the charges in paragraphs 11 (b) and 11 (c), said there was no need of those instructions since the charges in those paragraphs were abandoned. The verdict was returned January 12, 1944. January 22nd, defendant moved for judgment notwithstanding the verdict. May 15th the court granted plaintiff leave to file the amendment to subparagraph 11 (b). June 23rd, defendant's motion for judgment was denied and judgment for plaintiff entered.

Amendment may be made after verdict or judgment to conform the pleadings and proof. In this case, however, an amendment was permitted to a paragraph which had been abandoned. On the basis of the abandonment, two instructions offered by defendant appear to have been refused. No complaint is made of this. We simply point out the condition of the record.

Judgment of the Superior Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

LEWE AND BURKE, JJ. CONCUR.

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LEWE AND PURIS, Da. SOME D.

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RAY F. SCHUSTER and RUTH M. SCHUSTER,

Appellants,

w ..

JEFFERSON ICE COMPANY, a corporation, and BEN RIEKEN,

Appelless.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

328 I.A. 124

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover for personal injuries and property damage arising out of a collision on September 26, 1942, between plaintiffs automobile and defendants truck. Verdicts and judgment were for defendants, and plaintiffs have appealed.

Plaintiffs, with Ray Schuster driving, left home in Western Springs, Illinois in their 1942 Ford coupe for Madison, Wisconsin. Rain and mist prevailed and the pavement was wet as they drove northwest on U. S. Highway No. 14, approaching Crystal Lake, Illinois. As they came to about the center of a long curve leading under the Chicago & Northwestern R. R. viaduct, their car and the Ice Company's truck-trailer driven by Rieken bound southeast, collided. Plaintiffs' car veered northwest off of the road on to a dirt shoulder and into a rail guarding the north boundary of the highway and was deflected southwest where it came to rest about 100 feet east of the viaduct. The truck-trailer proceeded southeast about 200 feet after the collision. Both plaintiffs were injured and their automobile badly damaged.

In their complaint they charge the defendants with negligence in driving at an unreasonable speed and on the wrong side of the curved road in violation of Par. 146 (a), (b), subparagraph 4 (5c), and Pars. 151, 152 and 155 of the Motor Vehicle Act (Chap. 95½, Ill. Rev. Stats.). Defendants made issue of these charges.

charges.

PAY F. OCHUSTER, and RUTH M. COHUSTER, CONSTRUCTION, CONST

NA. O'S INTER JU FICE WILLY SELVED SON SON THE GOURT.

Tals is an action to recover the constant infurious and oroperty damage spicion out of a collistin on acteabler 36, 1944, between plaintiffs automobile and definite true. Vernious and judgment were for defendance, and a limitiff have a mealed.

Plaintiff, vici as foruster rivin, left nome in hestern borings, Illinois in their 1948 ford could for M alson, "isonsin, hain and mich provided and the pavement was et as they drove northwest or M. ?, fight y No. 14, especially brystal lands, illinois. As they came to shout the denter of a long curve leving under the Chicaro & Morthwestern T. A. visluct, their course the Ise Commany's truck-trailer driven by Micken bound southeast, collided. Flaintiffs' car verses northwest off of the boundery of the highway and into a rail quarding the north bounders to rest about 160 feet east of the visduct. The truck-trailer crosseded southerst about 900 feet after the collision. The plaintiffs were injured and their automobile badly assayed.

In their complaint they charge the defendants with negligence in driving at an unreasonable speed and on the wrong eide of the curved road in violation of Par. 146 (a), (b), subparagraph 4 (5c), and Pars. 151, 152 and 155 of the Motor Vehicle Act (Chap. 95%, Ill. Rev. State.). Defendants made issue of these

Rieken testified that he was "coasting" down the highway about 20 miles an hour. The highway inclined slightly to the east. Ray Schuster testified that it was "pretty hard" to judge speed within 10 miles of the actual rate. He said he would not care to judge the speed of the truck. Ruth Schuster "did not particularly see the truck approaching." Marian Marvil, plaintiff's witness, gave as her opinion of the truck-trailer's speed 40 miles per hour. She was, according to her testimony, "10 or 14", "15 or 20" feet to the rear of plaintiff's car on the curve. We cannot say the jury should have found that the truck-trailer at the time of the accident was being driven at an unreasonable rate of speed.

Rieken says he did not decrease his speed while going about the curve. Plaintiffs seize on this testimony as support for their claim that defendant violated paragraph 146 of the Act, by failing to slow down as he rounded the curve. We do not agree that, under the circumstances of this case, the jury was required to find defendant negligent in not reducing the speed below 20 miles an hour as he drove around the curve.

At the place where the collision occurred the highway is 20 feet wide. The black center line divides it into two 10 feet lanes. The inside or southeast edge is about 15 inches lower than the outside or northwest edge. This point is about the center of the curve. The curve here, according to the testimony and exhibits, is sharper. It is obvious that if plaintiff's Ford and the entire truck-trailer passed each other while each was on its own side of the highway, the collision would not have occurred. Since it did occur, one of them encroached in some way upon the lane for traffic going in the opposite direction. The question of which one se encroached was the crucial question of fact in the case.

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At the trial Ray Schuster testified that he observed the truck-trailer appreach and that it and the Ford were in their proper lanes in the highway, and that they passed and that is all he remembers. His wife testified that they were traveling about 35 miles an hour on the right side of the highway and that their car passed the cab of the truck and that the trailer struck their car and "we were swept right off the road " " ". " Marian Marvil testified that she was driving her car to the rear of plaintiffs! for about 10 or 15 miles: that she was driving about 35 miles an hour and that the two cars kept about the same relative distance; that going about the turn plaintiffs' car was about "10 or 14" or \$15 or 20" feet ahead of witness' car; that the truck came down the "incline rather fast": that the impact occurred at the "angle" of the curve; and that the trailer "lurched" over into the northwestbound lane and struck plaintiffs car, throwing it off the road into the guard rail.

Ricken testified that the trailer was 8 feet wide; that he was driving about 6 inches from the south edge of the highway; that the Ford came toward him "pretty fast and it straddled" the black center line of the highway and as it came closer the front end was "cutting into me;" that the truck passed the Ford and that all he knew was that something hit the trailer, as though someone had thrown a stone against it and that he stopped and discovered the accident and that "no part of my outfit" deviated from the right side of the road.

Plaintiffs were corroborated by the testimony of Witness
Marvil that, at the time of the collision, the Ford was on the
right side of the highway. In his pretrial deposition Rieken stated
that when he first observed Schuster's car it was in the proper lane and
that when it passed him, it was in its proper lane but coming toward

At the trial Ray Schuster tertified in the observed that truck-trailer acpresen and that it and the Ford vers in their first f dd bo. beesed your tedt bas , yewinid edt al senal record he remambers, wife terfifted that they reme traveling about 35 miles an hour on the right side of the minimax and that their oar passed the cab of the truck and that the trailer struck their is a serie are supply right off the rest to " " " inclear feevil testified that she was driving bor car to ine sear of plaintiffs! for about 10 or 15 miles; that she was driving about 35 miles an hour and that the two care kept spout the same calative listance; that going shout the turn of infiff; car was about the CI are % to or 20" feet abend of witness! our; hart the truck came down the "incline rether fast"; that the Last coursed it the "angle" of the curve; and tast the trailer "lurched" over into the northwestbound lane and ctimesk elaintiffe' each throwing it off the road into the guard rail.

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Flaintiffs were correborated by the testimony of Witness Marvil that, at the time of the collision, the Ford was on the right of the highway. In his pretrial deposition Wieken stated that when he first observed Schuster's car it was in the proper lane and that when it passed him, it was in its proper lane but coming toward

the black center line. He also stated that, going around the curve he had to watch his truck and did not know where the Schuster automobile was with reference to the black line. It will be seen that this testimony is somewhat different than that given by him at the trial. At the trial he said he saw the plaintiffs' car after he was 125 or 150 feet out from the viaduct. In the pre-trial deposition his testimony was that his first view of the car was as he came from under the viaduct.

It might seem in view of the differences in defendants' testimony, before and at the trial, that the witness Marvil's testimony should weigh the scale in plaintiffs' favor. The jury, however, may have considered improbable her testimony that she was driving 35 miles per hour over the wet pavement, turning the curve at a distance of only "10 to 14", "15 or 20" feet to the rear of plaintiffs' car. The jury may have believed that if she were that close she hardly could have avoided the truck-trailer which did not hit her car "so far as I know" and plaintiffs' veering car. The jury may have, in this view, further believed that if she were much farther to the rear at the point of impact, her position for accurate perception of the rear of the truck-trailer was not very good.

It is true that the skid marks were found only north of the center line. They are not so located, however, so as to make the jury's verdict unwarranted. Photographs in evidence, taken by Ray Schuster show that the center of the left side of his car bore the brunt of the impact. There is only one picture of the front of the car. This shows damage to the left headlight at a point level with the damage to the left rear mudguard of the trailer. There were no pictures available of the side of the left front fender of plaintiffs' car. We believe this evidence of the physical damage is consistent with defendants' theory of the accident.

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In conclusion we believe that the verdict was not against the manifest weight of the evidence.

The plaintiffs complain that the judgment should be reversed because of error in the giving of certain instructions for defendants.

Instruction No. 9 told the jury they were not bound to believe something to be a fact merely because a witness so stated, provided, from all the facts and circumstances of the case, the jury believed otherwise. Plaintiffs criticize this instruction for unduly singling out the Witness Marvil, for use of the term "merely" and because the jury is not limited to the evidence in the case. We see no merit in the first criticism, nor the second. Stollery v. Sprague, 301 Ill. App. 209. In support of the third, plaintiffs rely upon Ryan v. The People, 122 Ill. App. 461. In that case an instruction similar to this was disapproved. The word "facts" in the instant instruction, however, makes it more acceptable, although the term "circumstances" might be misleading. Moreover, in the Ryan case the reversible error was found not in giving the instruction similar to the one here, but in the giving of another,

Instruction No. 12 is similar to the "5th instruction" set out in <u>U. S. Brewery</u> v. <u>Stoltenberg</u>, 211 Ill. 535. These instructions sought to state the law as to direct and circumstantial evidence. Defendants here substituted the words, "is sufficient to warrant a reasonable conclusion that the fact in dispute is true" for the words in the instruction in that case, "constitute a preponderance of the evidence." We cannot approve the instruction as modified by defendants, but it seems clear that plaintiffs were not harmed by the giving of it. Instruction 13 is not well drawn.

In conclusion we selieve this the vertice, a not against the awhitest weight of the avilance.

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Fortruction 10. 9 following yearny tray and could to believe eracthing to be a fact merity december 1 interest of the provided, from all the facts and divergetual and if the court jury believed out relies. It is the contribution of the court induly cinciling out the witter of this the court of the court in the case. The court is jury is not in the case. The court is jury is not in the case. The court is the case of the cas

Instruction for the station to the hilb instruction set out in No. ". process." and the followings. All Inc. "75. There in the truetions sought to state the last of the state and discussion that set of the surficient to surrant a ressensible conclusion that one tark in isoute in true for the words in the instruction in this crew, "constitute a respondence of the evidence." We cannot approve the instruction as modified by defendants, but it seems clear that plaintific area not harmed by the jiving of it. Instruction 13 is not well instruction at harmed by the jiving of it. Instruction 13 is not well instruction as the last well instruction if the set well instruction is the not well instruction if the set well instruction is the not well instruction in the sixting of it.

We do not believe, however, that the giving of it was error. No other instruction was offered or given defining "proximate cause" and this instruction did not define the term well, but we believe the jury could understand the definition given.

Plaintiffs complain of the giving of instruction No. 18. It told the jury to take into consideration, in determining how much credence to give plaintiffs' evidence, "that they are plaintiffs and interested in the result of the suit, in determining the question of whether or not the defendant Jefferson Ice Company is guilty." Minus the italicized words, this instruction has been approved where plaintiff the the defendant was a corporation and the only witness entitled to receive or be liable for the payment of money. C. & E. I. R. R. Co. It has been condemned where defendants v. Burridge, 211 Ill. 9. are natural persons only (Engstrom v. Olson, 248 Ill. App. 480), and where there is a corporate and natural defendant and both the plaintiff and natural defendant testify. Doellefield v. Travelers Ins. Co., 303 Ill. App. 123. In the Olson case the giving of the instruction was not the principal error upon which reversal rested. In the Doellefield case another instruction told the jury it should not discredit defendant's testimony "from caprice or merely because he is defendant." In the instant case instructions 15 and 16 instructed the jury generally as to the bias interest, etc. of witnesses. Sued alone, the corporate defendant would have been entitled to the instruction. Plaintiff joined Ricken as co-defendant. italicized words, apparently sought to limit the instruction to the We cannot say that the instruction given misled the Ice Company. jury nor prejudiced plaintiffs in view of this record.

Instruction No. 22 told the jury that each plaintiff was duty bound to exercise ordinary care to look out for danger and to avoid injury as the truck driver was, and that one was not held in

We do not believe, beserve, that the piving of it was over. So other instruction was affered or siven destining "provides ourse" and this instruction did not ferine the term rell, but or colleve the jury could understand the farinition given.

Plaintiffe complain of the otring of intereston to. 18. It told the item to take take courteements on, in detamentation to williable for west fight witherest the transfer of the commensus the will be the commensus the comme and interested in the equal of the cutt. in determining the "qording of whother or not the definient different Tee Teeres to poilty. Minus the iteligions wards, this tastruction as to enved as and plaint the of feldline confile yfor bed the notherness a per inabhelph ent receive on te liable "or toe acreent at somey. (. 2 . E. . . startunted etain foundince invocated if T. PRITTING PIT III. . 7 are natural never east only ( negation v. Giron, 748 (17, op., 460), and where the or a required terminal rate without a st present areas. plaintiff one noture a corrector wastiff. . Tallefield v. Travelure ing, Eg., 208 ill. v.a. 127. In the liven tyre the iving of the Lubison Isan ven dulum mreu nomne foclonir hat inn ser meithum Joui In the Dealleffeld case carather incomment a tell the lary is about not diservalt defaminat's terlimony "from emerics or merely because be to defendent. " In the instant self instructions is end if largrupted the jury semenally on to the bine interest, etc. of witnesse. Sued alone. the correcte defendant rould have been cutibled to the instruction. Plainilff island licken we condeferrant. "he italicied words, speedly count to limit the instruction to the les Gemeany. We cannot ony that the instruction wives wished the jury nor prejudiced plaintiffs in visw of this resord.

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any higher degree of care in the law than was the other. This instruction was poorly drawn and may not have been clear. The words, "look out for danger" should have been omitted. Instructions No. 20 and 23, however, clearly outlined the meaning of the ordinary care required of plaintiff.

We find no reversible error in the instructions criticized.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LENE AND BURKE JJ. GONCUR.

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LENS AND DURKE JO. C. COTT.

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JUDGMENT AFFIRMED.

LEWE AND BURKE, JJ. CONCUR,

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The find no rever held meson in the lastruction delitions. I. For the responsible testing distriction.

JEDING ELECTION

LIVE OUT SEAT, JUL TOOM,

43309

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

V .

AMANTE RONGETTI,

Plaintiff in Error.

ERROR TO

COUNTY COURT

COOK COUNTY.

320 1.11. 124

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a five count information filed in the County Court of Cook County, Amante Rongetti was charged with violating provisions of Sec. 24 of the Medical Practice Act, (Sec. 161., Ch. 91, Ill. Rev. Stat. 1945). A motion to quash the information was overruled. Thereupon he pleaded not guilty. The case was tried before the court and a jury. The court directed a verdict for the defendant as to Counts 3 and 4 and denied motions for a directed verdict as to Counts 1, 2 and 5. Count 1 alleged that defendant diagnosed, or attempted to diagnose, the ailment of Louis Janczak as kidney trouble. Count 2 alleged that defendant did prescribe a large quantity of distilled water for the supposed kidney trouble of Louis Janczak. Count 5 charged that defendant maintained an office at 2900 West Van Buren Street, Chicago, equipped with a stethoscope, a blood pressure apparatus, a physicians! examining table, a sterilizing cabinet and bottles containing unknown ingredients. The jury found defendant guilty as charged in Counts 1, 2 and 5. Motions for a new trial and in arrest of judgment were denied and judgment was entered on the verdict. Defendant was sentenced to serve 90 days in the common jail of Cook County and to pay a fine of \$300 and costs of court. He brings the case here by writ of error.

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Defendant in frror,

v.

AMANTE POMEETTI, Plaintiff in Error.

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try a visual sid at hoft? a it wasted touce svit a al of Cook County, Americ Rongetti ... charged with violating orcavisions of sec. 24 of the acide 1 montice Act, (Sec. 131., Oh. 91, Ill. Nev. stat. 1045). .. notion to quech the information wes everrule. . . der wich he bleeded not willy. . . he case wall tried before the court was a jury. The court irected a verdict for the defenient er to fourtr I am a upd denied autions for a directed verdict : to Counts 1, 2 and 5, Count 1 : Rieged that derendant disenses, or ettempted to disenses, the ellment of Louis Jamezak as Fidney trouble. Count Colleged that defendant dil preceribe o large questity of distilled voter for the supprece kidney trouble of Louis Janezak. Count 5 charged that defendent maintained an office at 89% 'est Van Auren Otrest, Chicago, eculored with a stethoscope, a blood rescurs a garatus, s physicians examining table, a sterilizing calinet and bottles containing unknown ingredients. The jury found defendent guilty as charged in Counts 1, 2 and 5. Motions for a new trial and in arrest of judgment were denied and judgment was entered on the verdict. Defendant was sentenced to serve 90 ags in the common jail of Cook County and to pay a fine of 500 and costs of court. He brings the case here by writ of error,

Defendant urges that counts 1, 2 and 5 should have been quashed. The information in the instant case is almost identical in form with those in People v. Shaver, 367 Ill. 339, People v. Spencer, 369 Ill. 57; People v. Paderewski, 373 Ill. 197; People v. Moe, 381 Ill. 235; People v. Kabana, 383 Ill. 284. The objections now urged were made in those cases and the same authorities used to sustain the claim that no crime was properly charged, and such contentions were denied. No error was committed in holding the information good.

Defendant maintains that the court erred in permitting immaterial and irrelevant testimony on behalf of the People and in denying the motion to direct a verdict for the defendant. He also insists that the verdict and judgment are contrary to the law and evidence and that the court erred in denying his motions for a new trial and in arrest of judgment. Arguing these points, defendant states that the testimony of the complaining witness, Janczak, gave his opinion as to a technical subject of which he had no knowledge. The testimony of this witness was confined to what he saw and heard. He described the furnishings of the office in terms that any layman would understand. He described the blood pressure equipment and the manner in which it was used. The other equipment described is within the common knowledge of the average layman. The court did not err in denying defendant's motion for a directed verdict. We are of the opinion that the judgment and verdict are amply supported by the evidence. The judgment is not contrary to the law or the evidence and the court did not err in overruling defendant's motions for a new trial and in arrest of judgment.

Therefore, the judgment of the County Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Defendant unges that Sounce 1, 2 and t should have been cusshed. The information in the instant offer lengest identical in form with those in twoster. Source, 227, 1.339, People v. Spender, 359 III. 57; Sepole v. Angularith, 275 III. 197; People v. Angularith, 275 III. 197; People v. Angularith, 275 III. 197; The objections now urgs? The objections now urgs? The abjections were to satisfie the two orders was opened, and such contantions are the transfer, To separate openities. In holding the information poor.

Personal relation that the court error in termitting immaterial and irrelevent tentheony on mension the land in Copying the motion to lined beverior for the efendant, de else insirte that the varalet and judgment are controry to the law and evidence and thet in rough evenua to denying his motions for a new tried and in arract of judgment. Or main these points, defendent steine flit the lendings of the completified witness, Janeak, we his owint to se to a trainfeel subject of which no hell no knowledge. The testiment of the witness wer confired to rich he saw and items. He described the furnicalization of the less reterms that any laymer would understand. We described the blood prescure equipment end the a chem in which it ach used. The other equipment described is within the common samule go of the ever selaymen. The court did not eve is denying defendant's motion for a directed verdict. "e re of the cointen that the judgment and vertist are amoly supported by the evicence. The judgment is not contrary to the law or the evidence and the court did not err in overruling defendant's motions for a new trial and to arrest of judgaent.

Therefore, the judgment of the County Court of Cook

JUDGHENT ANFIRMED.

KILEY, P.J. WHE LEWE, J. CONCUR.

43428

In the Matter of the Estate of GUSSIE TEICHMAN, formerly known as GUSSIE BOLLER, Deceased,

BENJAMIN TEICHMAN, as Executor, Petitioner in Citation Proceedings,

Appellant,

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SARAH WEINBERG and MORRIS WEINBERG,

Respondents - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

320 I.A. 1

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.
Gussie Teichmen, also known as Gussie Boller, died at

Gussie Teichman, also known as Gussie Boller, died at Chicago on June 6, 1944. Letters testamentary were issued out of the Probate Court of Cook County on July 28, 1944 to Benjamin Teichman, as executor of her last will and testament. The executor filed a verified petition charging that Morris Weinberg and Sarah Weinberg "have in their or his or her possession or control" a note executed by Fred B. Lee and Cordelia Lee dated April 1, 1941, to the order of bearer in the principal sum of \$6,000, bearing interest at six percent per annum, a trust deed securing payment of the note and the sum of \$500 in cash; that the note, trust deed and cash were assets of the estate; that they failed and refused, after demand, to deliver to him the note, trust deed or cash; and he prayed for a citation. The citation was issued and served on defendants. In a verified answer respondents denied that they had any assets belonging to the estate and alleged that the items described in the citation as being assets of the estate, "passed to Sarah Weinberg as a gift inter vivos." A trial in the Probate Court resulted in a judgment that the citation be dismissed and respondents discharged. In a trial

43428

In the Matter of the Matha of GUBSIE TRICHMAN, formerly known as GUBSIE AGLER, facesed,

BINIONIN TEIGRMAN, as larguror, Petitioner in Citation Proceedings,

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Respondents - Appelles.

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Chicago on June 3, 1847. Littline testementiny rone lesued out of the Probate Jourt of Gong Jaunty on July 88, 1944 to Sanjamin Telchman, as executng of a last will ad testament. The executor filled a verifier petition than ing that Morris Teinberg and Sarah weinberg "have in their or his or her possesion or control" a note executed by bred . The and fordelin Lee dated April 1, 1941, to the order of bearer in the principal sum of \$8,000, bearing interest at aix secent ser annua, a trust deed securing payment of the note and the sum of 100 in ouch; that the note, trust doed and cash were never of the estate; that they failed and refused, after demand, to deliver to him the note, trust deed or cash; and he prayed for a citition. The citation was issued and served on defendants. In a verified shawer respondents denied that they had any assets belonging to the estate end alleged that the items described in the citation sa being assets of the estate, "passed to Sarsh Weinberg as a gift inter vivoa." A trial in the Probate Court resulted in a judgment that the eitation be dismissed and respondents discharged. In a trial

de novo in the Circuit Court following an appeal, the court found that the note of April 1, 1941 in the principal sum of \$6,000, bearing interest at six percent per annum and the trust deed securing payment, were not assets of the estate; that the trust deed and note were acquired by Sarah Weinberg as a gift inter vivos from Gussie Teichman in her lifetime, and ordered that the petition of the executor be dismissed and respondents discharged. The executor appeals.

Gussie Teichman conducted a rooming house at 5045 South Michigan Avenue, Chicago. She was a cripple, confined to a wheel chair, and had been in that condition for several years, Lee and Cordelia Lee owned the real estate at 4923 South Michigan Avenue. On April 1, 1941 the Lees executed a principal note for \$6,000, payable to bearer five years after date, with interest at six percent per annum, payable semiannually on April 1 and October 1. They executed ten interest coupons. The transaction involving the making of this loan took place at the office of the attorneys who now represent respondents. In April, 1942 the Lees made a prepayment on the loan of \$500, in September, 1942 a second prepayment in the same amount and in April, 1943 a third prepayment in the same amount, reducing the principal note to \$4,500 and reducing the semiannual interest payment on each coupon to \$135. These prepayments were made to the attorneys who now represent respondents and who, in receiving the prepayments, did so as attorneys for Gussie Teichman. By the testimony of two witnesses who were employees of the First National Bank of Chicago, the executor established that the interest coupons payable on April 1, 1943, October 1, 1943 and April 1, 1944 were collected for the decedent by the First National Bank of Chicago prior to

de nove in the Circuit Court following an appeal, the court found that the note of April 1, 1941 in the principal sum of 6,000, bearing interest at six percent per annum and the trust deed securing payment, were not assets of the estric; that the trust deed and note were acquired by Sarah Teinbark as a gift inter vives from Guesie Teichman in her lifetime, and ordered that the notition of the executor be dismissed and resymments discharged. The executor appeals.

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their respective due dates and that the proceeds were deposited in her savings account in that bank. The court received in evidence exhibits showing the collection of \$135 by the bank on September 29, 1943 and the deposit of that sum, less 25 cents for a service charge, to her credit in her account on the same date, and also exhibits showing the collection by the bank on March 27, 1944 of an interest coupon note in the sum of \$135 and the deposit on that date to her credit of that sum, less a service charge of 25 cents. The court refused to admit into evidence exhibits showing the collection by the bank of \$150 representing the payment of an interest coupon on April 22, 1943 and the deposit to her credit of that sum, less a service charge of 25 cents, on the same date. The court also refused to admit as an exhibit the savings account book of decedent showing her account with the bank. There is no contention that the transactions evidenced by the proffered exhibits are not truly and correctly recorded therein. We are of the opinion that the proffered exhibits should have been received.

The exhibits show that the interest coupons were delivered to the bank for collection for the decedent and that when collected, the amounts were deposited in her savings account, deposit slips being made out. Sarah Weinberg, a respondent, was identified by the teller of the bank as being the person who brought to the bank interest coupons falling due on October 1, 1943 and April 1, 1944, and that she instructed the bank to credit the proceeds to the account of decedent. The deposit book shows that on March 9, 1938 decedent deposited \$1,000 and that on July 28, 1944, when the account was closed following her death, there was a balance of \$4,362.61. This book shows a deposit on April 2, 1942 of \$500 and on October 8, 1942 of \$500. In all probability these deposits represent two of the prepayments made by the Lees. The \$500 paid by the Lees on April 1, 1943 was not deposited in this account.

their respective duc ustes and that the uncesta to deposited in her savings adjaunt in that bens. The court receives in evidence exhibits enowing one collection of 100 by the tank on September 29, 1942 and the decogit of that sus, less 20 cents for a service charge, to her credit in hor account on the came date, and cleo exhibite showing the collection by the tens on Earen DY, 1944 of an interest crupen note in the eur of 150 and the 'espeit on that date to meet and his of the term, less a sarried dispres on -25 cents. The court refused to whalf into evt eace exhibits shortow the collection be the inficit (150 vermeent, or the corporat of an interset couper on word 25, 1943 and the deposit to har credit of that eum, less a serving charge of Ma uants, or the case date. The court also refused to that we an excibit ind sevings account book of decedent showing her account with the bank. There is no contention that the transections switched by the proffered orbibilis are not truly and correctly recorded therein. We are of the ctinion that the spot and exhibit- should have been received.

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Ida Dashevsky, called by respondents, testified that she lived at 1434 South Kedzie Avenue, Chisago, and that decedent was her aunt. In answer to a question as to whether she had a conversation with decedent with respect to a mortgage on the real estate at 4923 South Michigan Avenue, she answered in the affirmative, and that the conversation took place at the home of her aunt, Mrs. Teichman, in the presence of witness's aunt, witness's mother and witness: and that her aunt "told my mother and I that she had given her sister some papers, mortgage papers, on the other house as a gift, " On being requested by the court to repeat the "exact words" used, witness answered: "Well, she said she gave her sister a gift of the mortgage papers on her other house that she had." testified further that by the words "her sister" she had reference to Sarah Weinberg and that decedent had only the one sister. Asked as to whether she had any conversation with respect to any other gifts, witness answered: "Yes, sir, I had such a conversation some time about a year and a half ago, I think, " She stated that she could not fix a more definite date for the conversation that that it occurred a year and a half previously; that witness's mother and witness's aunt, in addition to witness, were present at this conversation which took place at her aunt's home; and that in this conversation her aunt said "she gave her sister \$500 to help buy a home." Dora Teichman, called by respondents, testified that she lived at 1434 South Kedzie Avenue, Chicago; that she was a sister-in-law of decedent and the mother of Ida Dashevsky; and that she visited decedent every week. Asked as to whether she had a conversation with decedent with respect to a mortgage on the real estate at 4923 South Michigan Avenue, she answered in the affirmative, She testified further that the conversation occurred about the end of March or the first

lds Daebersky, or its to or acresones, vesticied that she lived at 1454 Fouth hedgie a snue, Diddago, ... the because war her sunt. In answer to a suc: tion at t sactaer size and a courseaiting tities decement within respect of the reference of the decement at 4925 South Michigan Svenue, She ares ared in the a "lipmative, and that the conversition took place at the news of ser surt, bri. Telebran, in the presence of theptologues, without griber and witness; and that he summer "told by suches are I the last as a wift, " On being remained . Our coupe to percent the "exact words" used, without enswared; "LAT", the half she have her alsten a gift of the mortguee in eee on we other noter time the har a testified further than by newered ster' she has reference to Daren weinhoug and the spring he calv one one sister. Asked sa to whether one has sty nourementon with nessent to any other gifts, withese supresed: "hor, sir, I am such a correstion some time about a gent ind a Lelf enc, I thinks " The elect that and could not fix a sore definite are for the conversablen the tent it occurred a year and a and i creviousiv; that withcome another and witness's aunt, in addition to sitness, were present at this convict sation which took place at her sunt's how; and that in this converestion her wunt said "ahe save ser eister now to help buy a home." Bors Telchman, called by respondents, tectified that see lived of 1434 South Medale Avenue, Unicero; that she was a sister-in-law of decedent and the mother of Ida Laphevery; and that All 18-18-60 every week. Asked as to whether one had a convergetion with decedent with respect to a sorthmas on the real catate at 4000 South Mehigan Avenue, she suswered in the offirmative. The testified further

that the conversation occurred about the end of March or the first

part of February, 1944. She also stated that the conversation occurred "a year and a half ago" and that it took place at decedent's home in the presence of her daughter Ida, decedent and witness. Answering a question as to what was said in the conversation, witness replied: "She said she gave her sister, Sarah, the papers on the house for a gift and she gave it to her to have it." Objections by the attorney for the executor to the testimony of these witnesses and motions to strike the answers on the ground that witnesses were giving their conclusions rather than the conversation, were overruled.

There was testimony that decedent died in a hospital at about 4:30 p.m. on June 6, 1944. Morris Weinberg, one of the respondents, testified that he lived at 4609 North Harding Avenue, Shicago; that on the night of the afternoon when decedent died, he, with Mrs. Sarah Weinberg, the other respondent, their son Sidney Weinberg and Benjamin Teichman, who was later appointed executor, went to the late home of decedent at 5045 South Michigan Avenue; that "we collected all the valuable papers there;" that Mr. Teichman "looked at it and we put it in a shopping bag. We put all the papers in a shopping bag, what I thought was valuable papers, and those that we were supposed to examine; " that Mr. Teichman and witness examined the papers and that after putting them in a shopping bag "we were supposed to go to his daughter and my daughter-in-law:" that Mrs. Ouida Smith, the housekeeper, was present and gave them the shopping bag; that they went to an elevated station and started to go to his daughter's home to examine the papers. From other testimony it appears that Mr. Teichman did not go to the home of Mr. Weinberg's daughter that night. Witness festified further that

part of Pebruary, 1944. The also risted that the conversation courred "a year and a half age" and that it took place at decedent's home in the presence of ner Sughter Ids, decedent and witness. Asswering a question as to what was said in the conversation, witness replied: "She caid she prve her sister, Carah, the papers on the neuse for a wift and the grave it to her to have it." Objections by the eticoney for the executor to the testimony of these witnesses and spitches to strike the enswers on the ground that witnesses were civing their conclusions rather than the conversation, were overpuled.

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"the mortgage on the 4923-25 Michigan Avenue property was not among the papers that we put in the shopping bag; " that he had a further conversation with Mr. Teichman when they were leaving the cemetery: that in that conversation Mr. Teichman asked witness if he had the keys to the safety deposit vault where decedent "kept her stuff. " and that witness answered in the negative; that witness also said that the key was over on Michigan Avenue; that Mr. Teichman asked witness to get the key to the box: and that witness went to decedent's former home a few days later and in the presence of Mr. and Mrs. Smith, found the key. Witness testified that the next conversation with Mr. Teichman was the following day at witness's home, when Mr. Teichman came to "look at the papers: " that in the presence of witness and witness's wife Mr. Teichman asked him where the \$6,000 mortgage was; that witness told him to "forget it because we had the mortgage a long while in our possession;" that decedent "gave it to us and that we can prove that the mortgage is in a safe keeping." He testified further that he did not tell Mr. Teichman that it was in a safety deposit box; that he and his wife had a safety deposit box at the Albany Park Bank and that the first time he visited the box after the death of decedent was on November 1, 1944; that at that time he opened the box in the presence of two employees of the vault company and took out the mortgage; and that "the mortgage and all the papers, notes were in there. "

Rose Kaufman, called by respondents, testified that she was vault custodian at the Albany Park Safety Deposit Vault; that when a customer comes to the counter he signs an entry slip; that she checks the signature against the signature card; that she then lets the customer into the vault and opens the box, which she hands to the customer; that from the entry slips she enters

"the mortgage on the 4927-25 Wiebigar .venus orecorty was not amon, the powers that we but in the educator beg; " that he and a further conversation with Mr. Isticaush then they were leaving the cemetery; that in that convergetion Mr. Teichmen sixed of thees if he had the keys to the safety demonia vault where decadent "kept her stuff," and that witness answered in the nestive; that witness also said that the Rey was over on 'deblyan avenue; that Mr. Telchman asked witness to set the sey to inchor; and that witness went to decedent! a former home a few days later and in the presones of Mr. and Mrs. Saith, found too key. "Itness testified that the next conversation with ir. Weighter was the following day at witness a home, when Mr. Telebash a me to "look at the pacers;" that in the presence of witness and witness! "Ifo Mr. Twichman almod him where the 16,000 morrogen was to a sitness told bim to "Torpet it because we had the mortgere a loss wille in our bossepsion; " that decedent "give it to us and that we can orgive that the mortgage is in a sofe keeping." We testified further that ne did not tall Mr. Teichm n that it was in a safety deposit box; that he and his wife had a safety deposit boy at the Albeny Park can and that the no asy transpool to disab ent matter the deals was sait faril Movember 1, 194.; that at that time he chened the box in the presence of two employees of the veult company and took out the mortgage; and that "the mortgage and all the papers, notes were in there. "

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the date the customer was in the vault; and that Mr. and Mrs. Weinberg have a safety deposit box there. Witness identified a card showing entries to the box by Sarah Weinberg and Morris Weinberg. The eard shows entries by Sarah Weinberg on April 20, 1944, May 2, 1944. May 15. 1944. November 6. 1944. two entries on November 9, 1944, and other subsequent entries by Morris Weinberg on May 19, 1944, May 26, 1944, November 1, 1944, November 10, 1944 and other subsequent dates. Witness stated that there are approximately 1.000 entries to the vault in a month; that either she or one of the other girls makes all of the recordations on the card and that the card is made up in the ordinary course of business under her supervision. In answer to a question as to whether it is possible that some entries may have been made and not have been recorded on the card, she answered in the affirmative. She further testified that according to the card the first entry to the box after June 6, 1944 was on November 1, 1944; that Marshall Sampson and she were present when the latter entry was made; that Mr. Weinberg asked them to take his box and look into it and that they refused; that they opened the lock on the door and handed the box to him; that he refused to take it; that she took it to the counter where Mr. Sampson and she could look; that Mr. Weinberg took out "a trust deed and a number of notes;" and that they checked the number on the trust deed with the contents of an affidavit which Mr. Weinberg had. On examining the affidavit to refresh her memory, she gave the Recorder's number on the trust deed. She also testified that she believed there were "four notes and a mortgage" and the trust deed; that there were four interest coupons and that the trust deed was separate from the principal note and the interest coupons.

the date the customer was in the Lult; and that Mr. and Mrs. Weinberg have a sainty deposit bor there. Witness identified a card showing entries to the new or warah sincers and Morvis keinbern. The card snows, entries by terms winbers on saril 20, 1944, way 2, 1944, May 15, 1944, Movember 6, 1944, two entries on .evember 9, 1944. and other subsequent entries by Morate 'elabers on Mr. 12. 1944, May 25, 1944, Formber 1, 1944, hovember 10, 1844 and other subsequent stee. "Itages stated thet there are approximately 1,000 entries to the vault in a month; that elther ele or one of the other mirls makes all of the record tions on the oard and that the card is made up in the ordinary course of busines; under under her supervision. In shaver to a question as to wasther it is codsible that nowe entried may have ween ande and not have been recorded on the cert, she amswered in the wifing three Tarther testified to t according to the and the first entry to the box after June 5, 1944 was on tovember 1, 194; that Marshall Bampeon and she were present wasn the latter entry was cade: that Mr. Your last bus ti otal good ban word and sail of ment begas grednist refused; that they opened the look on the door and manded the box to him; that he refused to take it; taut same took it to the counter where Mr. Sampson and she could lock; that hr. Weinberg took out "a trust dood and a number of notes;" and that they checked the number on the trust deed with the contents of an affilavil which Mr. Weinberg had. On examining the afficerat to refresh her memory, she gave the Recorder's number on the trust deed. Inc also testified that she believed there were "four notes and s mortgage" and the trust deed: that there were four interest coucons and that the coupons. Sarah Weinberg, called by respondents, testified that she is a sister of decedent; that about 10:30 p.m. on the day her sister died, witness and her husband, their son and Mr. Teichman went to decedent's former home; that she informed Mrs. Smith, the housekeeper, that decedent had passed away and that she wanted to "collect some papers there that would come in handy;" that Mrs. Smith gave her a shopping bag; that she put "everything" in the shopping bag and went home; that the "mortgage on the property at 4923 South Michigan Avenue" was not in the shopping bag; that the first time she went to their safety deposit box after the death of her sister was on November 1, 1944; that in the presence of Mr. Sampson and Mrs. Kaufman they examined the contents; that "the note and mortgage were in the box;" and that at that time she took "one of the notes out for collection."

Ouida Smith testified that she was the housekeeper for decedent and that the house consisted of 13 apartments. Asked as to whether she had any conversation with decedent with reference to a gift of money to Mrs. Weinberg, she answered in the affirmative, and that the conversation was around March 15, 1944. Asked as to what decedent said with respect to "this money gift", she answered: "She said she was going to give it to her for a gift, she is giving it to her, making a gift of that \$500." Mrs. Smith, called as a witness by the executor, testified that decedent was an invalid; that the last time decedent left her home was "around about 143;" that Mrs. Weinberg came over once or twice a week. Asked as to whether she had discussed with decedent the matter of a mortgage "on Michigan Avenue", she answered in the affirmative, and that the conversation was in January, 1944, when decedent took sick; that decedent "told me that she was going to tell me about her will and she said the mortgage would - her mortgage was going back to her

Sarah Weinberg, uelled by respondents, that the tag her cho is a sister of decelent; that theut 10:30 p.s. in the day her sister died, witness and her husband, their son and Mrs. Smith, the went to decedent's former home; that she informed Mrs. Smith, the housekeeper, that decedent had eased away and that she winted to "collect come capers thate that would come in handy;" that here. Smith gave her a shopping bag; that abe out "everything" in the shoping bag and went here: that "he "mortgage on the property at eARS South Michigan Avenue" was not in the chopping bag; that the first time she went to their safety decesit for after the death of her siefer was on Movember 1, 1944; that in the presence of Mr. Exapeon and was on Movember 1, 1944; that in the presence of Mr. Exapeon and was in the box; sand that at that the took "one of the notes and nortgage out for collection."

Cuida Smith testiff d in t the west the housemespor for decedent and that the house consisted of 15 goarthents. Asked as to whother she had any converetion with Ascedant with reference to a gift of money to are. Weinburg, she succeed in the afficuative, and that the conversation was around March 15, 1944. Assed as to what decedent and with respect to "this maney gift", she answered: "She said she was going to give it to her for a gift, she is giving it to her, making a gift of that 1000. 4 Mrr. Smith, called as a witness by the erecutor, testified that decedent as an invalid; that the last time denedant left her home was "areund about '45;" that hre. Weinberg come eve once or trice a week. Asked as to whether she had discussed with decedent the matter of a sortgage on Michigan Avenue", she caswered in the effirative, and that the conversation was in Jamesry, 1944, when decedent took sick; that bns fliw red trode em flet of gniog saw eds fadt em bloth inebesed she said the mortgage would - her mortgage was going back to her

estate, be added to her estate and be divided according to her will." Witness stated that the income from the operation of the rooming house was \$200 a month and that after paying expenses, \$100 was left; that on the night of June 6, 1944, after the death of decedent, Mr. and Mrs. Weinberg, their son Sidney and Mr. Teichman came to the house: that Mrs. Weinberg told her to come with them to decedent's apartment "to see what we are taking out of this place:" that she went with them; that "the place was ransacked and everything was looked through; " that "they turned the covers up and they found \$26 in money on the table under the tablecloth and they took some papers from the drawers and from the cedar chest: " that Mr. Teichman did not take anything; that Mr. and Mrs. Weinberg and their son were "looking for things;" and that she put the papers in her purse. Benjamin Teichman testified that he was a nephew of decedent; that on June 6, 1944, Mr. and Mrs. Weinberg, their son Sidney and witness went to the former home of decedent; that they went through several papers, some of which they threw aside and some of which Mrs. Weinberg put in her purse; that Mr. Weinberg's son gathered other papers together, which were put in a shopping bag; that Mrs. Weinberg did not hand him any papers; that he was standing in the middle of the room and that he did not see the papers that were taken,

The burden was on respondents to prove by clear and convincing evidence the essential facts of a gift by delivery of the property by Gussie Teichman to the donee with intent to pass title. <u>Keshner v. Keshner</u>, 376 Ill. 354. In the latter case the court said (363):

<sup>&</sup>quot;It is well known that courts lend a very unwilling ear to statements by interested persons about what dead men have said; that such evidence is subject to great abuse and that it will be carefully scrutinized as well as considered with all the other evidence in the case."

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Appellant maintains that the testimony of Ida Dashevsky and Dora Teichman relative to an alleged conversation with decedent amounted to mere conclusions and was improperly received in evidence. We are of the opinion that it was not error to receive this testimony. However, the evidence to prove delivery or intent to make a gift falls far short of that clear and convincing proof which the law requires. There was a confidential relationship between decedent and respondent Sarah Weinberg. In Warren v. Pfeil, 346 Ill. 344, our Supreme Court said (360):

"A fiduciary relationship is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and client, and other recognized legal relationships, but extends to every possible case in which there is confidence reposed on one side and a resulting superiority and domination on the other. The origin of the confidence may be moral, social, domestic or merely personal. If the confidence in fact exists and is reposed by one party and accepted by the other the relation is fiduciary and equity will regard dealings between the parties according to the rules which apply to such relation."

Sarah Weinberg and decedent were sisters. Decedent was a cripple and confined to a wheel chair. Mrs. Weinberg acted as a messenger in collecting interest represented by the coupon notes and in depositing such interest to the credit of decedent. Ida Dashevsky testified about two conversations and about two gifts. She said one conversation occurred the latter part of March or the beginning of April, 1944 and related to an alleged gift "of the mortgage papers." The other conversation took place about a year and a half before the trial. The date of the trial was January 5, 1945, which would fix this conversation as occurring during July, 1943. In this last conversation decedent is represented as having said she gave her sister \$500 "to help buy a home". Mrs. Smith testified about a conversation with decedent around March 15, 1944 wherein she quoted decedent as saying she was going to give Mrs. Weinberg a gift of \$500, and also that "she made her a gift of \$500." Mrs. Dashevsky

Appallent maintaine the the thetheony of the caperage and the Telchman relative to an allowed converget in the decident arounted to mere conclusions and was introverly relative. As satisface, "e are of the opinion that if was another and the transfer the object of the opinion that it was fallied and to make the object of the clear and northicles are faithful to make the requires. There are confidential relationship metabern tension and respondent Carsh ciabers. In "seren was traited and respondent Carsh ciabers. In "seren was traited our furreme Court caid (350):

\*A fiduciary relationship is not limited to mess of truster and ocetal cue insut, yuardian and mane, attorney and olient, and other recognized 1 of relationships, so that are ade to avery receible case in which there is confidence proceed on one tile and a resulting numerically and headinstion on the confidence and be access, social, hereafted on merchy entered in fact arists and is reacted or merchy and accepted by the other tile out til not at fillowing and acuty and accepted by the other tile out tile of the relation regard dealings between the action are of the relation.

Serah cinberg and decedent were there. Decedent we seemed confined to a wheel chair. Mrs. winters noted of the messelment is decided in decodabiling interest recess and by the cluster that interest to the army of seed ont. The following testified about two conversations and most two gifts. The cast onversation coursed the latter part of tarch or the criminal of taril, left and related to an alleged, lift sof the mortgage caper. The other conversation took class chout a year and a half before the trial. The date of the trial was January 5, 1945, which would fix this conversation as occurring during July, 1941. In this last conversation decedent is represented as begins and the gave her stater \$500 "to help buy a home". Mrs. Smith testified about a conversation with decedent around March 10, 1944 wherein she quoted decedent as earling to give Mrs. Weinberg a gift of \$500, and also that "ahe made her a gift of \$500." Hrs. Dashevsky

\$500, her mother, Mrs. Dora Teichman, was present, but the latter was not asked nor did she testify concerning the \$500. Although in the petition and answer filed in the Probate Court there was an issue joined as to the \$500, when the case was decided in the Circuit Court there was no finding as to the \$500. It is also interesting to note that in the order entered in the Circuit Court there was no finding or disposition as to the ownership of the interest coupons.

It appears that decedent also had a safety deposit box and that after her death Mr. Teichman asked respondents for the keys to this box. The latter found the keys at the former residence of decedent. Admittedly, the trust deed, principal note and interest coupons involved were not in decedent's safety deposit box, or there would be no controversy. The evidence shows that the trust deed, principal note and four interest coupons were in the safety deposit box belonging to respondents at the time it was opened in the presence of employees of the vault company on November 1, 1944. It is also shown that this box was not entered between May 26, 1944 and November 1, 1944. In our opinion the evidence shows that at the time of the death of Gussie Teichman, the trust deed, principal note and interest coupons were in respondents safety deposit box. It is interesting to note that interest coupons Nos. 7, 8, 9 and 10, with due dates of October 1, 1944, April 1, 1945, October 1, 1945 and April 1, 1946, were also in respondents box. The interest coupons collected and credited to decedent's savings account on March 26, 1943, September 29, 1943 and March 27, 1944 were delivered to the bank by respondent Sarah Weinberg. It appears to be conceded that all of the interest coupons were the property of decedent at the time of her death. The contention of respondents appears to

testified that at the time of the conversation relating to the \$200, her mother, Mrs. Dere seichmen, was present, but the latter was not asked nor all she testify concerning the CC. Although in the petition and shave filled in the Prolate Court tere was an issue joined as to the FRC, when the case was decided in the Circuit Court theore was no finding at firsting as to the Proceed in the Circuit there was no finding or discontilian as to the sense hip of the interest coupons.

Timenet tiethe o bad and tuebeosb t at annague il box and that after har death Mr. Detains as we ween tente for the keys to this bor. Incluther yound the help at bno tormer residence of decedent. Admittelly, the twet deed, ortheterl note and interest congene lavelyed were not in decelent! : sofuty deposit box, or there would be no controvery. The aviornee shows that the trust dead, principal note and four interest coupons were in the cafety deposit box belowing to respondents it the time it was opened in the creasure of employees of the veult company on Movember 1, 1944. It is also shown that this box was not entered between May Pt. 1844 and Movember 1, 1844. In our colnion the evidence shows that the time of the depth of Gussie Teichman, the trust csed, principal note and interest coupons were in respondents safety deposit box. It is interesting to note that interest coupons Nos. 7, 8, 8 and 10, with due dates of October 1, 1944, April 1, 1945, Cotober 1, 1945 and April 1, 1946, were also in respondents box. The interest coupons collected and credited to decedent's carings account on March 26, 1943, September 29, 1945 and March 27, 1944 were delivered to the bank by respondent Garah Weinberg. It appears to be conceded that all of the interest coupons were the property of decedent at the time of her death. The contention of respondents appears to

be that the trust deed and principal note were delivered to them or to Sarah Weinberg as a gift, and that title to the interest coupons remained in decedent. However, when respondents box was opened on November 1, 1944 it contained the unpaid interest coupons, trust deed and principal note. This strengthens the position of petitioner that Sarah Weinberg was at all times acting in a fiduciary capacity. Apparently, when an interest coupon became due, Mrs. Weinberg took such coupon from the safety deposit box and delivered it to the bank for collection to be credited to decedent's account. It is clear that in so doing she was acting as a messenger or agent of her sister, Gussie Teichman.

We find that the evidence shows that Sarah Weinberg acted as a fiduciary of the decedent; that she was in possession of the principal note, interest coupons and trust deed as such fiduciary at the time her sister died; that the burden was on her to show that her possession of the papers as a fiduciary became that of possession as an owner; and that she failed to make this proof. As petitioner points out, there are at least three versions of the story as to whom the trust deed and principal note belonged. Sarah Weinberg claims them to be hers by her answer: Morris Weinberg claims decedent "gave it to us, " meaning respondents; and Mrs. Smith, the housekeeper, testified that decedent said "it was to be added to her estate" and "divided according to the will." Fred B. Lee, the owner of the real estate secured by the trust deed, testified that he always made his interest payments at the First National Bank and that he never received any notice from anyone that he should pay at any other place. If Sarah Weinberg was the owner of the paper in January, February or March, 1944, it is strange that she did nothing toward notifying Mr. Lee of the change of ownership and that she deposited the interest note maturing April 1, 1944 with the First National Bank for collection

be that the trust deed and principal note were delivered to them or to Barah seinberg as a gift, and that title to the interest commons remained in decedent. Mowever, when respondents! now was opened an November 1, 1944 it contained the unpaid interest coupans, trust deed and principal note. This strengthens the position of petitioner that ferch inhere, was at all times witing in a fiduciary capacity. When which an interest compon became due, hrs. Weinberg took when coupan from the refety december and delivered it to the cust coupants in a decedent's account. It is clear that in so doing she was setting as a messenger or agent of her sister, dussis into n.

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"It is unthinkable that a man with one leg, unable to earn his living, would strip himself of every penny he had on earth and hand out twenty two hundred dollars to a nephew without any contract or agreement for care and keep the rest of his life, and no provision for sickness, last illness, funeral expenses, care and support of a four year old daughter, and give it all to a nephew. \* \* \* The facts and circumstances in evidence show that the donee occupied a confidential relationship with the donor."

The facts and circumstances of the case at bar make it improbable that Gussie Teichman, a cripple confined to a wheel chair, with only a small income from a rooming house and the income from the mortgage, would make a gift of the mortgage having a value of \$4,500.

For the reasons stated, the judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions to enter a judgment finding that the trust deed, principal note and interest coupons were the property of Gussie Teichman at the time of her death; that they are now the property of Gussie Teichman Teichman. as executor of the estate of Gussie Teichman, deceased; and directing that Sarah Weinberg and Morris Weinberg, and each of them forthwith deliver the trust deed, principal note, interest coupons and interest, if any collected, to Benjamin Teichman, as executor.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

for the account of her stater. There is no proof at to when the alleged gift was consummated, now were there any eyevitnesses to the consummation of the alleged wift, or that the property was ever claimed by Seroh elaberg to be here in the prevence of her stater. There is no areas as to when the sileged gift was made. Gueste Tetchman's anly income was about 100 for month from the operation of the rotaing house and the income as about 100 for month from the disoute. In the case of In religious of In the case of In religious of the month of the received to have received is, 200 of the uncle's money where a nephew cleimed to have received is, 200 of the uncle's money as a gift inter vives can't money was in the nether's possession before the death of his uncle, the court said 105):

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JUDGMENT REVERSED AND CAUSE
REHANDED WITH DIRECTIONS,
KILEY, P.J. AND LEWE, J. CONGUR.

43455

EMILY PILACKUS.

Appellant,

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PAUL PILACKUS, ANNA RITCHIE and AGNES GEDRAITIS, Executors of the Estate of PAUL PILACKUS, also known as PAUL PLATZ, Deceased, State Bank of Clearing, as Intervening Petitioner,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

323 I.A. 126

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Emily Pilackus and Paul Pilackus were married at Chicago on September 11, 1912. Two children were born of the marriage, namely, Otto, born February 26, 1914, and Joseph, born December 19, 1916. On August 10, 1925 a decree was entered in the Superior Court of Cook County, on the bill of complaint filed by Emily Pilackus, the answer of Paul Pilackus, a stipulation and evidence. The decree dissolved the bonds of matrimony, gave her the care, custody and education of the children, and directed him to pay her \$10 a week for their support.

On October 4, 1944 plaintiff filed a verified petition setting out that she reared the children to maturity; that shortly after the entry of the decree defendant "made his presence unknown" to her and their children; that it was "only within a few days last past" that she learned of his whereabouts; that following the entry of the decree she received from him the aggregate sum of \$80 for the support and maintenance of the children; that because of defendant's failure to comply with the decree, she had to rely upon the charity of friends and relatives and of the man she married in 1927; that the amount due under the decree was \$5,610; that she thad been informed" that defendant maintained a

EMILY "TLACKUP,

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PAUL FILICKUS, ARRA AITCH; and AGNES GRORALFIN, Executors of the Estate of PAUL FILIGIPUS, also known as FAUL FILIT, Decessed, State Bank of Tie Ping, as Intervening Petitioner,

Appelleor.

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bank account in the State Bank of Clearing, Chicago, the amount to his credit therein being unknown to her; that the account is "carried under the alias of Paul Platz;" that she feared the removal of the account if notice be given of her application for relief; and she prayed for an order requiring the bank to tender an accounting of the funds, if any, in its possession to the credit of defendant and that the bank and its agents be restrained from making any disbursement of the funds credited to defendant until the further order of the court. On the same day a supplemental petition was filed by plaintiff containing substantially the same allegations, but adding a prayer that the clerk issue a writ of summons requiring the Sheriff to summon the bank to answer her petition. On October 4, 1944 the court, without notice to the defendant or the bank, entered an order restraining the bank from paying out any amounts to the credit of Paul Pilackus or Paul Platz, and that it answer her petition in ten days. The record is silent as to how the bank was notified that a temporary injunction was granted, On October 7, 1944 an officer of the bank sent a letter by registered mail to the clerk of the Superior Court, and a copy to the attorney for plaintiff, stating that in answer to the "Chancery Order", it did not have an account in the name of Paul Pilackus, otherwise known as Paul Platz, and that to the best of his knowledge the bank did not have any account nontaining funds belonging to defendant. On November 29, 1944 the same officer of the bank sent by registered mail to the clerk of the Superior Court and a copy to the attorney for plaintiff, a second letter, stating that upon further search of its records an account was found in the name of Paul Platz, showing a balance to his credit of \$2,014.63. On December 4, 1944 plaintiff filed a further petition, verified November 30, 1944, stating that on that date she was informed of

bank account in the State Bank of Clearing, Chicago, the gasunt to his credit therein being unknown to her; 'ast the account is "carried under the pline of Paul Plate;" that the fe red the removed of the account if notice of eiven of his artification for reliaf: and sus prayed for an order requiring fue won! to tender an accounting of the funds, if any, in its cost section to the oredit of defendant and that the bank and its agente be no trained from making of the control of the find about 1 and to descend the serial and an interest the control of the control the further order of the court. On the early by a subplemental settion was filed by plaintiff contribin, arbstratisly the same allegations, but adding a prayer that the along is us a arti of summons requiring the heart? to cursen the braket her her petition. On Cotober 4, 1844 the court, without notice to the derendent on the bonk, ontered an order north linia the bank from paying out any amounts to the credit of Paul Fillokus or Daul Fints. and that it enswer her netition in ten itys. The record te silent as to how the bank so notified that a temporery injunction was grunted, On Cotolin 7, 1944 on officer of the line cent eletter by registered anil to the cleak of the Eulerlow Court, and a coos to the attorney for plaintiff, abiting that in anger to the "Chancery Order", it did not have an account in the name of Faul Pilactua, otherwise known ar Paul Flats, and that to the best of his knowledge the bank did not have ony account nontaining funds belonging to defendant. On November 29, 1944 the same officer of the bank sent by registered mail to the clerk of the Sucerior Court and a copy to the atterney for plaintiff, a second latter, stating that upon further search of its records an account was found in the name of Paul Platz, showing a belence to his credit of \$2,014.63. On December 4, 1944 plaintiff filed a further petition, verified November 50, 1944, stating that on that date she was informed of the recent death of defendant and prayed for the entry of an order restraining the bank and its agents from paying out any funds to the credit of her former husband, then deceased. On December 4, 1944 the court entered an order reciting that it was informed that defendant died and ordered that the bank and its agents be restrained from paying out any amounts credited to Paul Platz, deceased, until the further order of the court.

On January 22. 1945 the court entered an order reciting that it appearing that the bank had not theretofore been served with a summons and "is not a party hereto", that a summons issue against the "duly appointed and qualified administrator or executor of the estate of Paul Pilackus," deceased, and also that a summons issue against the bank. Writs of summons were served on the bank and on Anna Ritchie and Agnes Gedraitis, Coexecutrices of the last will of Paul Pilackus, deceased, On March 8, 1945 the bank filed its appearance and a petition representing that at the time of the death of defendant it had on deposit to his credit the sum of \$2,014.63; that it had expended \$5 in filing its appearance and had incurred certain attorney's fees in the matter, and prayed that an order be entered authorizing and directing it to deposit the balance of the funds with the clerk of the court, or with such other party as the court might determine, to be held until the final order of the court determining who was entitled to the funds, and that it be dismissed from the case. On March 8, 1945 an order was entered that the petition of the bank stand as its answer to the petition of plaintiff, and that the coexecutrices be given leave to answer the petition within 20 days.

On March 19, 1945 the coexecutrices filed a special appearance for the "sole purpose of questioning the jurisdiction of the court." On March 19, 1945 they filed a motion to dismiss plaintiff's petition and to dissolve the restraining orders on the

the recent death of defendant and wayed for the entry of an order restraining the beak and its agents from on the out any funds to the credit of her former humband, then decessed. In Decement 4, 1944 the court entered an order reciting that it was informed that defendant died and ordered that the bank and its agents be restrained from paying out any amounts credited to Paul Flutz, decessed, until the further order of the court.

On January 25, 1945 the doubt entered on order resiring bey'd aggering that the Lun' had not theretofore been served with a surmous und "14 not a praty her to", that a steams issue systact the "duly equatated and qualified whimists too or equator of the setate of Frul lilectur, " days red, and what t summons issue symingt the bonk. This of augons were corved on the John and on kans titchie and these sireits, Cooreratrices of the last will of Paul Filackus, deceased, On March C. 1945 the bank filed its appearance and a velition representant that at the fire of the desth of defendant it had on despoit to his oredit the run of \$2,014,63; that it had expended . 3 in filling its accerence and bar incurred certain attorney's feet in the metter, and rayed that an order be entered authorising and directing it to deposit the belance of the funds with the clerk of the court, or with such other party as the court aight determine, to be bold eath the final arder of the court determining who was entitled to the funds, and that it be dismissed from the case. On March 6, 1945 an order was entered that the patition of the brok stand ... its ensure to the potition of plaintiff, and that the coexecutrices be given leave to answer the petition within 20 days.

On March 13, 1945 the coexecutrices riles a special appearance for the "sole purpose of questioning the jurisdiction of the court." On March 18, 1945 they filed a motion to dismiss plaintiff's petition and to dissolve the restraining orders on the

ground that plaintiff's claim had not been reduced to judgment, was not preferred, did not constitute a lien, that it abated upon the death of defendant prior to the making of the bank as a party defendant, and that the court had no jurisdiction of the subject matter.

On March 28, 1945 plaintiff, under the name of Emily Mitkus, filed an answer to the petition of the bank and denied that the bank was entitled to reimbursement for any sums other than court costs. On April 16, 1945 plaintiff filed a counterclaim in which she asked for a judgment against the bank for the difference between the amount which she might receive from a claim filed against the estate of deceased and the sum of \$2,014.63. On April 17, 1945, on motion of the attorneys for the bank, the court ordered that the order entered April 16, 1945, giving plaintiff leave to file an amended petition and counterclaim, be vacated, and that such petition and counterclaim be expunged from the record. April 18, 1945, on motion of the coexecutrices, the court ordered that the petition and supplemental petition of plaintiff filed on October 4, 1944 and December 4, 1944 be dismissed, that the injunctions be dissolved, and that the bank pay all moneys standing to the credit of deceased to the coexecutrices. Plaintiff appeals.

Plaintiff states: "The Superior Court of Cook County having original jurisdiction over the subject matter and the parties, the same having been assumed and attached thereto, the court never lost its jurisdiction, nor did the appellant's cause of action abate by the death of the original defendant, whose coexecutors were substituted as parties in his place and stead. Survival of the proceeding is wrought by statute." Plaintiff cites Sec. 11 of the Abatement Act, (Sec. 11, Ch. 1, Ill. Rev. Stat. 1945) that when there is but one defendant in an action, proceeding or complaint,

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On Merch 23, 1945 plaintiff, unuse the noise of saily Mittue, filed an energy to belition of the and self , suitiff that the bank wor enthilled to palebarecent for any suge ather than court coeff. In wiril ld, 1945 platning of a contending in which she asked for a judgment smilner the Lork for me difference between the smount which the might conclus "rom a claim filed. against the estate of facounci. Du are au of fille.5%. On bothl 19, 1945, on motion of the attorneys for the heak, the court ordered that the arder eaters that At, 1916, giving lithist I was so file an smended polition and occurrence. on vecesed, and that such petition and counterclain be excurred toom the record. On April 16, 1945, on cotton of the obseewerised, the court ordered ne Laffa Talitainig te neitl. . . Itiam engles ne neitlise edt talt October 4, 1944 and December 4, 1944 be dismissed, that the injunctions be dissolved, and that the bank only all hamser arending to the credit of decessed to the coexecutvices. Plaintiff spoonls.

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and he dies before final judgment or decree, such action, proceeding or complaint shall not on that account abate, if it might be originally prosecuted against the heir, devisee, executor or administrator of such defendant, but the plaintiff, petitioner or complainant may suggest such death on the record, and shall, by order of the court, have summons against such person or legal representative, requiring him to appear and defend the action, proceeding or complaint, after which it may proceed as if it had been originally commenced against him, Plaintiff maintains that it was the duty of the court to determine the amount due her under the decree and to have ordered the amount credited to deceased's bank account paid over to her to apply on the amount found due her. her brief, in support of her counterclaim against the bank, plaintiff argues that she was misled to her prejudice by the incorrect statement in the bank's letter of October 7, 1944 that there was no account in the name of her former husband. This counterclaim was asserted on the theory that the conduct of the bank in thus misleading her, was actionable. In the oral argument counsel for plaintiff stated that she was not asserting any claim against the bank in her counterclaim. This amounts to a withdrawal of the contentions asserted under her counterclaim and we will, therefore, not discuss the counterclaim.

In the brief filed by the coexecutrices, the following statement appears: "In plaintiff's brief it is stated that the executors insist that plaintiff's claim be filed in the Probate Court. We do not so insist, but we do maintain that in whatever court plaintiff files her claim she is an ordinary creditor and can expect no greater remedy, but that her claim when proved, be ordered paid in due course of administration. Further, that in

and he dies before final judgment or decree, such action, proceeding or complaint shall not on that account abate, if it might be criginally prosecuted against the heir, deviser, erecutor or administrator of such defendant, but the Wainister, etitioner complainant may suggest such death on the record, and aball, by order of the court, have summons ansimpt such person or legel representative, requiring him to appear and defend the action, orccecding or complaint, after which it may proceed as if it had been originally commenced spaines hir, Picintiff maintains that it was the duty of the court to determine the emount due her under the deeree and to have ardered the wasum" credited to deceased a bank account paid over to her to apply on the amount found due her. In her brief, in support of her counterelsia sgainst the bank, claimtiff argues that she was alsled to her prejudice by the incorrect statement in the beak's letter of October 7, 1944 that there was no secount in the neme of her former Euchand. This counterclaim as asserted on the theory that the conduct of the bank in thus mislegding her, was settonable. In the oral arrument councel for plaintiff stated that she was not a serving ony claim against the bank in her This emounts to a withdrawal of the contentions counterclaim. asserted under her counterelaim and we will, therefore, not discuss the counterclaim.

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insisting that her claim be paid with the entire funds in the bank, she is requesting relief she is not entitled to and which the court could not grant her, and that by so doing she has failed to state a cause of action." Sec. 18 of the Divorce Act. (Sec. 19, Ch. 40, Ill. Rev. Stat. 1945) provides that the court may enforce the payment of alimony and maintenance in any manner consistent with the rules and practice. Sec. 42 of the Chancery Act, (Sec. 42, Ch. 22, Ill. Rev. Stat. 1945) provides that the court may enforce a decree either by sequestration of real and personal estate, by attachment against the person, by fine or imprisonment, or both, by causing possession of the real and personal estate to be delivered to the party entitled thereto, or by ordering the demand of the complainant to be paid out of the effects or estate sequestered, or which are included in such decree, and by the exercise of such other powers as pertain to courts of chancery, and which may be necessary for the attainment of justice. Sec. 47 of the Chancery Act provides that when there shall be no direction that a master in chancery or commissioner execute a decree, the same may be carried into effect by execution, or other final process, according to the nature of the case, directed to the sheriff or other officer of the proper county, which shall have the same operation and force as similar writs issued upon a judgment at law. Defendant contends that any claim which plaintiff may have should be allowed as a claim of the seventh class, as provided in Sec. 202 of the Probate Act, (Sec. 354, Ch. 3, Ill. Rev. Stat. 1945). In Dinet v. Eigenmann, Admr. 80 Ill. 274, our Supreme Court said (279):

"But it is objected that the complainant, after recovering the decree for alimony, died, and that it has never been paid. " " " The legal liability of the husband for alimony was in the nature of an obligation or duty to a stranger. It was a duty imposed by the statute upon him to contribute to the support of the divorced

insighing that her claim oe unid with the early fund in the bank, she is requesting rolles she is not suti as to and which the court could not great ber, and that by ac baker the best 1980 to state a names of action." See, 18 of the Divorce of, (.eq. 19. Ch. 40, Ill. Bev. Stat. 1945) provides that the court asy enforce the mayand of alimony one maint and or its any menter of sistent with one rules and precises. Sec. 42 of the Shawery at, (Sec. 42, Ch. 22, 111, Rev. tat. 1045) inopices that the event may enforce a decrea either by actuarthan of real onl sersonal estate, by ottacker t sestant is, nor or, by fine of isomicont, or both, by dawing ogsaes ion of the real and ereach about be delivated to the party entitled thursts, or by or brink the domand of the complainant to bus min out of the effects or and he sequestored, or which are included in such decree, and by the exercise of such other covers or pertrin to courte of chancery, and which may be necessary for the attainment of justice. Sec. 47 of the Chancery Act provided that cancerance shell be no livertion chat a master in chancer; or commissioner errouss; then me may be carried into effect of execution, or ther find roseas, adending to the nature of the cite of the cite of the center of the of the proper county, which chall have the ears regretion and force se similar writs issued upon a judgment at law. Perturber's restands that any claim which pigin'iff may bave incurate selected as a claim of the seventh olas , as roviced in Jec. 202 of the Protate Act, In Dinet v. Lengenn, tdar, (Sec. 354, Ch. 3, Ill. Rov. Stat. 1945). 80 Ill. 274, our buoreme Court said (279):

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wife; and when the amount was ascertained and fixed, the right to the money became vested and as fully fixed as had the money been paid or the husband had given his note for the amount. The husband could not resume it, nor did he become entitled to it on her death. It was absolutely the wife's, and went to her representatives precisely as would any other money decree against any other person. It, then, follows that her executor or administrator had the right to proceed and collect it in the same manner that any other decree could be enforced after the death of the person in whose favor it was rendered."

In the case of <u>In re Estate of Kossuth H. Bell.</u> 210 Ill. App. 350, we said that the claim of a widow against her husband's estate for the amount unpaid under a decree for alimony is to be treated as any other obligation of the deceased at the time of his death and is recoverable as a claim of the seventh class.

The orders granting the injunction restraining the bank and its agents from disbursing the funds were not the equivalent of the service of a garnishment summons, or the service of a writ of attachment. All these injunctions sought to do was to restrain the bank from paying out the funds. This they accomplished. Plaintiff did not have a judgment entered against defendant during his lifetime. On his death her position as to the alimony and support money then due was the same as the position of any other person having a seventh class claim. In our opinion Sec. 11 of the Abatement Act does not affect plaintiff's position as a claimant against the estate. That section permits certain actions and proceedings to continue against the personal representative of a sole defendant. Whether the case is tried in the Circuit or Superior Court or in the Probate Court, plaintiff could not have her claim for the accrued alimony and support money allowed except as a seventh class claim.

The chancellor was right in refusing plaintiff the relief she sought. We do not know whether plaintiff, as a safeguard, filed a claim in the Probate Court within the nine months allowed by the Probate Act. In view of the statement of defendants that they do

wife; and when the emount was ascertained and fixed, the right to the money became vested and as fully fixed as hed the money been paid or the husbend had given his note for the emount. The husbend could not resume it, nor did he uscome entitled to it on ner death. It was absolutely the wife's, and sent to har representatives precisely as would any other money learned regimet any other bad the right to proceed and collect it in the same manner that any other decree could be enforced after the death of the person in whose fever it was rendered.

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The chancellor was right in refusing plaintiff the relief she sought. We do not know whether plaintiff, as a careguard, filed a claim in the Probate Court within the mine mouths allowed by the Probate Act. In view of the statement of defendants that they do

not insist that she file her claim in the Probate Court, we feel that she should be given an opportunity to have it allowed in the Superior Court. For the reasons stated the order of the Superior Court of Cook County is reversed and the cause remanded with directions to enter an order allowing plaintiff's claim in the amount the court shall find was due at the time of deceased's death, against Anna Ritchie and Agnes Gedraitis, as coexecutrices of the estate of Paul Pilackus, deceased, as a seventh class claim, to be paid in due course of administration; that the injunctions be dissolved and that the State Bank of Chearing pay the amount standing to the credit of Paul Pilackus (alias Paul Platz) deceased, less its costs, to Anna Ritchie and Agnes Gedraitis, coexecutrices of the estate of Paul Pilackus, deceased; and that the costs in the Superior Court and in this court be assessed against plaintiff.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

not indist that she file her claim in the Pobete Court, we feel that she should be given an opportuity so have it allowed in the Superior Court. For the remains etared the arder of the acceptant Court of Cook County is reversed and the arge of the remainsh directions to enter an order allowing ilrights for alle in the emount the court whall find any due to the time of receptals amount the court whall find any due to the time of receptals death, against Anna Titchie and the redwalfit, or an recutal edeath, against Anna Titchie and the feather time, the order less claif, to be eath in due course of dade sed, as the injunction be dissolved and the time dredt of the disse fank of Clearing pay the anount standing to the oredit of fault of the catate of and the feather find and the feather of Paul Filadaus, decessed; and what the areas in the detect of Paul Filadaus, decessed; and what the areas in the Getster of Paul Filadaus, decessed; and what the areas in

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LOUIS H. FREISE.

Appellant.

V .

MID-CITY TRUST AND SAVINGS BANK OF CHICAGO, a banking corporation, and MID-CITY NATIONAL BANK OF CHICAGO, a banking corporation,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is the second appeal of this cause. Plaintiff. Louis H. Freise, a licensed real estate and insurance broker, filed his amended complaint in chancery for an accounting and to recover commissions in the sum of \$750,000 alleged to be due him from the defendants Mid-City Trust and Savings Bank of Chicago, a banking corporation, and Mid-City National Bank of Chicago, a banking corporation, for services rendered by him as such broker while employed by the defendants. At the close of plaintiff's case, defendants' motion for a finding in their favor was allowed by the chancellor and the amended complaint dismissed for want of equity. Plaintiff appeals,

Plaintiff was employed by the Mid-City Trust and Savings Bank (hereinafter called "Savings Bank") from March 16, 1920 to March 1, 1922, and reemployed from July 1, 1923 to March 23, 1933, when he resigned at the request of the president. During the period from November 20, 1923 until his resignation March 23, 1933, plaintiff served as manager of the real estate loan department and as a member of the real estate committee. In that capacity he "consummated deals" on real estate with the owners of property or brokers representing them, inspected and appraised real estate, and wrote insurance. In January, 1929,

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This is the second spoosed of ... c use. ... intiff, Louis H. Treise, solitonech rest estate the incurrence broker, filed his amended complaint in chancery for an accounting and to recover commissions in the sum of 170,000 alloyed to be due him from the defendants wideflaty there and a land of and of this go, a bandary then, and alloyed allower by him as Chicago, a banking comportion, and allowers we allower while employed in the defendents. If the aloce of plaintiff coses, defend this motion for the light in this fover was allowed by an enterior or set the prender of the dismission was allowed by an enterior or set the prendess color of the dismission want of courty. Takintiff or setly.

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During the period from November 50, 1928 until his resignation March 23, 1938, plaintiff served as manager of the rest estate loss department and se a member of the real estate with the that capacity he "consummated deals" on real estate with the owners of property or brokers representing them, incredted and sappraised real estate, and wrote insurance. In Jenuary, 1929,

he was elected cashier. On May 8, 1933, defendant Mid-City National Bank of Chicago, a banking corporation (hereinafter called "National Bank") entered into a written contract with Savings Bank whereby National Bank purchased all the assets of Savings Bank and assumed all of its liabilities. The gist of the amended bill of complaint is that plaintiff, at the special instance and request of defendant Savings Bank, procured licenses as a real estate and insurance broker from the State of Illinois and the City of Chicago for the purpose of conducting the real estate loan and insurance department of Savings Bank and for the conduct of a general real estate brokerage business and charging commissions therefor; that he managed and conducted in his own name and in connection with Savings Bank an extensive real estate brokerage and real estate loan and insurance business. Defendant Savings Bank had collected and retained from various customers and others large commissions and fees which should have been paid to plaintiff because Savings Bank was not licensed to conduct a brokerage business; that payments on account of such commissions were made to the plaintiff from time to time, and the Savings Bank provided him, without charge, desk room on the premises of the bank as well as stationery, telephone, telegraph services, and clerks. It is further alleged that Savings Bank caused records to be kept of all the transactions covering collection of fees and commissions earned by plaintiff, as well as the payments made to him on account thereof, and that these records are now in the possession of the defendants; that plaintiff demanded of defendants an accounting of the moneys due him, which they declined and refused to furnish.

On the first trial, each defendant filed a general and special demurrer to the bill. The chancellor overruled the demurrer

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of Savings Bank and sustained the demurrer of the National Bank. and dismissed the bill as to it for want of equity. Plaintiff appealed from that portion of the decree dismissing the bill as to National Bank. This court reversed the decree, sustaining the demurrer of National Bank to the amended bill and dismissing it for want of equity (280 Ill. App. 622). After the cause was remanded to the trial court, the defendants filed answers. answers averred substantially that the plaintiff was an employee and during the period of his employment his salary ranged from \$4,000 to \$7,500 annually, that as an employee it was his duty to account to defendant for all commissions received from any source in the course of his employment and that in connection with the banking business, Savings Bank conducted a real estate loan and insurance department and had the power to lend money on personal and real estate securities and the right to charge commissions therefor. Defendants further denied that Savings Bank eyer made any payment on account of commissions to plaintiff, and aver that plaintiff's claim was barred by the statute of limitations and laches.

Replications were filed by plaintiff to the answers, denying that the salary received by plaintiff included or could include the alleged commissions earned by him, and denied that defendants had any legal right to charge commissions.

Plaintiff's principal contention is that Savings Bank had no authority under the law to act either as an insurance broker or as a real estate broker and collect commissions therefor, and that the fact that defendant Savings Bank paid plaintiff a fixed salary during the entire period of his employment does not bar plaintiff's claim for commissions, since an agreement to accept a stated salary in lieu of commissions earned as a broker is against public policy. In support of his position, plaintiff cites

Anderson v. City of Jacksonville, 380 Ill. 44; George v. City of

Danville, 383 Ill. 454; State Bank of Blue Island v. Benzing, 383 Ill.

of Baringe bank and sustained the enurser of the Nation 1 to and dismissed the bill as to it for eart of wity. A. intiff appealed from the territor of the dearest of mark belanged to Matlorel Lank. This erurt revered the derive, sentaining the desurrer of Mational and to wer acaded 411 of the fattered it for same of equity (ago III. son. 682). After the result will remanded to the trial court, the scendant files that he the appropriate substanti lly the checking or a soft fit went he new yester old themself his to follow this meland bas 14,000 to \$7,500 annually, that se so employed it was hit they to secous you mend by views and italiance of and fandamend of faucess in the course of his employment and tast in exaction with the bankine business. Divinge tank conducted a real arise to loon and incurance department and had the cover to lond ashed on certaini and real setate securities and the right to char-c doubtedland therefor. Defendants farther denied of t c.vin . I amk ever dade any payment on menount of cormitmient to plaintiff, and ever the pisintiff's claim was parerd by who strtute of limit tions and 'tohes.

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Anderson v. City of Jacksonville, 580 Ill. 44; George v. City of Danville, 383 Ill.

40; Leigh v. American Brake Beam Co., 205 III. 147; and Pitsch v. Continental Bank, 305 III. 265, particularly stressing the latter two cases.

In the Pitsch case, the claim of plaintiff, a notary public, was for money had and received to his use by the bank for notarial services rendered by the plaintiff. The court held (305 Ill. 272) that, "the whole matter of fixing his compensation for official services by private contract when it is already fixed by law was contrary to public policy and the contract was therefore void. " Since real estate brokers! fees are not fixed by statutes we do not think this case has any application to the case at bar. In Chicagoland Agencies v. Palmer, 364 Ill. 13, the court held that provisions of Sec. 11 of Ch. 73 relating to insurance agents and solicitors was unconstitutional. All the other cases cited by plaintiff hold in effect that where a contract is ultra vires or against public policy no recovery can be had. The factual situations, however, are not the sams as or similar to that in the present case. In the instant case Savings Bank lent its own funds and charged commissions therefor. So far as the record discloses, it did not engage in a general brokerage business. To perform its corporate functions we think the Savings Bank had the right to use its funds as disclosed by This power is clearly incidental to the express this record. power granted banks under Section 1, ch. 162 relating to banks, page 235 Ill. Rev. Stats. 1945.

The allegations of the amended complaint were construed in the former appeal (280 Ill. App. 622). There the court said:

<sup>&</sup>quot;The bill is not predicated upon the theory that complainant performed a brokerage service for Savings Bank, nor that he received any compensation from Savings Bank for such services, nor that any compensation was agreed upon for such services. When its allegations are reasonably construed the theory of fact of the bill is that complainant operated the business in his own name under licenses issued to him, that Savings Bank collected the fees due him, made certain payments on account of the same to him, but has withheld large sums of money rightfully belonging

40; Leigh v. American Brake Ream Co., 208 111, 147; and Pitsoh v. Continental Fank, 205 111. 265, particularly stressing the latter two cases.

In the Titsoh osse, the claim of clainties, a notary public. was for momey had and received to mis use by the hand for notarial services rendered by the plainilif. The court held (305 Ill. 872) that, "the whole retter of fixing his concenetion for official comices by private contract when it is already fixed by law wee contrary to cublic policy and the contract was boxil for sin seel farguleste to brokers fees and ". List earlier fees by statuted we do not think this case has any coolingtion to In Obicsgoland Avenolag v. Palmer, 564 111. 1. the case ot bar. the court held that provisions of Sec. 11 of Ch. 75 relating to insurance spents and solicitors was unconstitutional. All the cther cases wited by olgintiff hold in effect that where a contract is ultra vires or against nublic policy no recovery can be bad. The factual situations, however, are not the same as or similar to that in the oresent case. In the instant case Savings Bank lent its own funds and charged commissions therefor, So far as the record discloses, it did not engage in a general brokerage businers. To perform its corporate functions we think the Savin's Bank had the right to use its funds as disclosed by this record. This naver is clearly incidentel to the express power granted banks under Section 1, ch. 16% relating to banks, page 235 Ill. Hev. čtats. 1945.

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<sup>&</sup>quot;The bill is not predicated upon the theory that complainant performed a brokerage service for Savings Bank, nor that he received any compensation from Savings Bank for such services, nor that any compensation was agreed upon for such services. When its allegations are reasonably construed the theory of fact of the bill is that complainant operated the business in his own name under licenses issued to him, that Savings Bank collected the fees due him, made certain payments on account of the same to him, but has withheld large sums of money rightfully belonging

to him. "

In the opinion rendered by the chancellor (Abst. 33) it appears that this is the theory which he adopted.

The record discloses that the only testimony offered was that of plaintiff. He testified that when he was reemployed about July 1, 1923, he talked with William J. Rathje the then president of Savings Bank. Defendants' counsel objected to the alleged conversation between plaintiff and Rathje, basing his objection upon Section 4 of the Evidence Act, It appearing that Rathje had died in October, 1932, the chancellor sustained the objection. Plaintiff's counsel then offered to prove that Rathje as president of defendant Savings Bank requested plaintiff to take out broker's licenses and to conduct a real estate department of the bank for himself since the bank was not permitted to do a real estate or insurance business. An objection was also sustained to the foregoing offer. Plaintiff further testified: "I never had a written contract with defendant Savings Bank and was never employed by defendant National Bank; Mills requested me to resign and I accepted his orders and cleaned out my desk; then I mentioned to him (Mills) How about all these commissions on the real estate loans and insurance commissions. Well, he said, we will have to see about that. In Since the foregoing proof offered by plaintiff failed to support the allegations of the amended bill of complaint, the chancellor properly sustained defendants motion at the close of plaintiff's case.

For the reasons indicated, the order dismissing the bill for want of equity is affirmed.

AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

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The record ilsoloses that the only to channy oftered was that of claiming. He testified that when he was recolleged about July 1, 1922, he talked with illies J. Reinje the toes resident of Savings Bank. Defendante ocunsel chiester to the liberal conversation between theintif and property beaing his objection upon Section 4 of the Evilence -ot. It Ammerica that Rathly had dist in Cotober, 1932, the chruceller suctined tos dijection. Thisto during then offered to prove that Traile as aread in einerord uno efficient Cliffice Cefren da Mask agnivad franceleb licenses and to conduct , real orders country that the bank see no ed. 3ed feet a no ed bedfirmen for her while seit sonis lisemid insurance business. As chisotion has also sustained to the firegoing offer. Plaintiff further tectified: "I never had a written yd Leyclone goven are har harden ewilyar tagleeleb til w teatroo defendant Mational Bank; hills requested ne to real, a and I doespted his orders one cleaned out my jeek; then I continued to bis (Mills) 'How about all these commissions on the real est, e loans and insurance commissions. I vell, he cald, we will have to see about Since the foregoing proof offered by deintiff filed to support the allegations of the emended bill of complaint, the chancellor properly custained defendants! motion at the close of plaintiff's case.

For the reasons indipated, the order dismissing the hill for want of equity is affirmed.

AFFIRMED.

MILEY, P.J. AND BURKE, J. CONCUR.

43133

ELMER C. KRAUTER,

Appellant,

Appellees.

APPEAL FROM

V .

ROBERT S. ADLER, ALBERT K. ORSCHEL, ABRAHAM GREENSPAHN and MAX ADLER,

SUPERIOR COURT

COOK COUNTY.

328 I.A.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiff, a real estate broker, to recover damages resulting from defendants' wrongful dissolution of a corporation with which he had a contract for broker's commissions. Plaintiff appeals from an order sustaining defendants' motion to strike his second amended complaint.

From the allegations of the second amended complaint it appears that the plaintiff procured the Illinois Bond Stores, Incorporated, hereinafter called Bond Stores, as a tenant for the 6339 South Halsted Street Building Corporation, hereinafter called "Corporation"; that the Bond Stores, entered into a written lease with the Corporation which provided, inter alia, that it would pay annually to the Corporation additional rental above a fixed minimum based on the gross sales of certain merchandise; that the plaintiff was to receive an additional broker's commission annually amounting to 5 per cent of the additional rental received by the Corporation from Bond Stores; that the plaintiff received the additional broker's commissions for the years 1935, 1936 and 1937; and that Bond Stores, still remains in possession of the premises under the lease with the Corporation and continues to pay the additional rental due under its terms,

43133

FIMER C. KRAUTER,

Aprellant,

ROBERT S. 1 LLER. LLERT K. ORSCHYL, ARRIERN GRELNSPARK and MAX APLEE.

Abbellees.

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AR. JUSTICE LEW DELICETOR THE CHAIN OF A DOUBL.

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but that the plaintiff has not received 5 per cent thereof annually since 1937, as provided in the agreement (Plaintiff's Exhibit A) between the plaintiff and the Corporation.

The plaintiff further alleges that in 1935 defendants conspired. combined and confederated among themselves to avoid the payment of the additional broker's commissions due plaintiff and, as part of the conspiracy and without notice to the plaintiff, the defendants caused the corporation to be dissolved by their willful refusal to pay the franchise taxes; that after the dissolution of the Corporation, defendants acting as officers of a de facto corporation conveyed the interests of the Corporation to the defendant Robert S. Adler who, acting in pursuance of said conspiracy and with the connivance and assistance of the other defendants, sold the premises now occupied by Bond Stores, to one Ryan: that afterwards defendants distributed the proceeds of the sale of the premises among themselves; and that defendants, fearing they would be held to account to the plaintiff for the additional broker's commissions, procured an indemnity agreement from Ryan to save themselves harmless from any action instituted by the plaintiff against the defendants.

Plaintiff's theory is that it is an actionable wrong for those in control of a corporation and who will receive its assets to dissolve a corporation to escape the performance of its contracts. Defendants contentions are that the complaint does not state a cause of action, and that the suit was not brought within two years after the date of the dissolution.

The English doctrine announced in <u>Lumley v. Gye</u>, 2 Ellis & Blackburn, 216, and <u>Bowen v. Hall</u>, 50 L. J. Q. B. 305, has been generally followed in Illinois. In <u>Bloom v. Bohemians</u>, Inc., 223 Ill. App. 269, at p. 274, the court said:

but that the plaintiff has not received is an titlerest unually since 1937, as provided in the agreement (2) indiffic (xoluit 4) between the plaintiff and the Corneration.

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"The theory of this doctrine is that a party to a contract has a property right therein which a third person has no more right maliciously to deprive him of, or injure him in, than he would to injure his property real or personal, and that therefore such an injury amounts to a tort for which the injured party may claim compensation by an action in tort for damages."

The same doctrine was approved in <u>Doremus</u> v. <u>Hennessy</u>, 176 Ill. 608, 617; <u>London Guarantee Co. v. Horn</u>, 206 Ill. 493, 504; and <u>Meadowmoor Dairies v. Drivers! Union</u>, 371 Ill. 377, 381; 41 Harvard Law Review 728.

In considering the defendants' motion to strike, we must assume that the allegations of the second amended complaint are true. All of the stock of the Corporation was actually owned and controlled by defendant Max Adler. About nine months after plaintiff's contract (Exhibit A) with the Corporation was executed, the legal existence of the corporation was terminated by the defendants. Although the Corporation was no longer in existence, plaintiff received payments on account of his broker's commissions for two years after its dissolution. These payments, plaintiff charges, were made to deceive him. After the sale of the premises to Ryan, the proceeds were shared among the defendants. In effect, the Corporation was used by the defendants as a subterfuge to rid themselves of an obligation to the plaintiff.

Since the law has been long established that the plaintiff had a property right in his contract for broker's fees with the Corporation, we see no reason why he cannot recover for the injury sustained as a result of defendants' wrongful acts. The plaintiff's second amended complaint contains all the essential elements of an action in tort for damages.

This brings us to a consideration of the defendants next contention, that the suit was not brought within two years after the dissolution of the Corporation. The record discloses that the original complaint, as well as the second amended complaint,

\*The theory of this doctrine is that a name to a contract has a property right therein which a third cerson has no more which maliciously to deprive him of, or injure him in, then I would to injure his property real or personal, and that iderefore about injury amounts to a tout for which his injure? Arty key claim compensation by an action is fort for frances."

The same doctrine was soproved in Lorentz v. Princert, 178 711. 3. 4. 617; London Cuarautee Ce. v. horn, 908 111. 476, 364; - 6. Meadowmoor Natries v. Driverel Lation, 771 111. 979, 381; 31 Tars 44 Law Peylew 728.

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This brings us to a consideration of the defendants next contention, that the suit was not brought within two years after the dissolution of the Corporation. The record displaces that the original complaint, as well as the second smended complaint,

was predicated on the theory of the wrongful dissolution of the Corporation by the defendants, thereby making it impossible for it to perform its agreement with the plaintiff. Since it involves the "same transaction or occurrence", the filing of the second amended complaint is permissible under Section 46 of the Civil Practice Act. (Metropolitan Trust Co. v. Bowman Dairy, 369 Ill. 222; Graves v. Needhan, 379 Ill. 25.)

Nor is the action barred by Section 94 of the Business Corporation Act, since the complaint is not predicated upon the theory that the defendants are liable as officers, directors or stockholders of the Corporation. When reasonably construed, the allegations of the complaint show that the defendants conspired to destroy the Corporation, sell its assets, and pocket the proceeds, all to the injury of the plaintiff. The mere fact that they held offices in the Corporation does not change the character of their liability. If they had not held such offices but had committed the acts complained of, their liability would have been the same under the circumstances. We are therefore impelled to hold that the period during which suit may be instituted is governed by Section 15 of the Limitations Act (Ch. 83, Sec. 16, Rev. Stats. 1939).

Defendant also urges that the entire agreement is without consideration because it is based on a past consideration. The amended complaint alleges that plaintiff was engaged prior to September 4, 1934 to procure a tenant. We must therefore assume that the engagement of the plaintiff took place before the execution of the lease between the Corporation and the Bond Stores. Even so, a past consideration for the promise is sufficient under the circumstances, since it appears that the services were rendered by the plaintiff at the request of the corporation. (Winefield v. Feder, 169 Ill. App. 480; Williston on Contracts, Vol. 1, p. 519.) We consider defendants contentions untenable.

was predicated on the theory of the wron! ful dissolution of the Gorporation by the derentants, then a making it impacible for it to perform its agreement with the limits. Since it involves the "same tran action or occurrence", the filling of the account amended complaint is cermissible under Leet on AC of the Stati Practice act. (Netropolitan Trust Dr. v. 100 Lan and ry, D62 111. 27.)

Nor is the notion by section 90 of the business Corporation ast, since the constant is not prodicated, the upon the theory that the defendants are likedle so officers, theorem of the desponsition, hen account y constants, the allegations of the desponsition, and that the savent constitues to destroy the demonstrate, sell its as etc., at accept the archers, all to the injury of the staintiff. Its mere has been the character of their filed little. If they had not assent the description of the formalisty would now seen the sector of their the circumstances, so has their the circumstances, so has therefore trush and constant the period during which suit may be fartified to take the continues. So has the the timitudes of the timitation to the time time to the timitation to the time to the time to the time t

Consideration because it is based on a case deposition. The consideration because it is based on a case deposition. The same ded complaint allocate that office tire case and therefore assume that the engagement of the plaintiff took plane before the engagement appears the former that the services were rendered by the stances, since it appears that the services were rendered by the plaintiff at the request of the corporation. (Thefield v. Teder) consider defendants! contentions untenable.

For the reasons stated, the order sustaining the defendants' motion to strike is reversed and the cause is remanded with directions to proceed in a manner not inconsistent with this opinion.

REVERSED AND REMANDED.

KILEY, P.J. AND BURKE, J. CONCUR.

Nor the reasons stated, the order sustaining the defendants motion to strike is reversed and the cause is remanded with directions to appended in a manner not inconsistent with

this opinion.

REVERSED AND TELLARDED.

MILEY, P. J. IND BURKE, J. DONGU.

CHARLES R. WHITE,

Appellant,

V.

AMERICAN ELECTRIC FUSION CORPORATION, a corporation, and EDMUND J. HENKE,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

325 I.A. 128

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles R. White, brought an action at law against the defendants American Electric Fusion Corporation, a corporation (hereinafter called "corporation") and Edmund J. Henke, for breach of a written employment contract. There was a rjury trial, a verdict and judgment in plaintiff's favor for \$2500. Thereafter defendants moved for a judgment non obstante veredicto and for a new trial. The court entered judgment non obstante veredicto and dismissed the suit. Plaintiff appeals.

The complaint alleges, in substance, that on October 10, 1942 defendants, in writing, offered to and did employ plaintiff in the capacity of commercial director of defendants' business for a term of one year from about November 1, 1942 at the yearly salary of \$12,000; that on October 13, 1942, plaintiff, in writing, accepted said offer of employment; that, pursuant to said agreement, plaintiff entered the employment of defendants and continued therein from October 26, 1942 to December 18, 1942 and performed all the terms and conditions required of him by said contract of employment; that on December 18, 1942 defendants wrongfully discharged plaintiff and since that time have prevented him from performing his part of the agreement, although plaintiff has duly tendered his services to defendants; wherefore the plaintiff asks judgment in the sum of \$8,187.11.

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CHARLS . THIT,
Appellant,

V.

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Plaintiff, then defendent then the problem of the color of the series the defendent that the defendent that it is a componsition (hereinefter celled "correction that it and Formal I. Henke, for breach of a written real cyment contract. There were a jury trial, a vertice and jufferent in "sinfiff" from for 3500. Thereafter defendent moves for a just and for a new friel. The court of just and for a new friel. The court and just and non veredicto and for a new friel. The court and just and the new colors of the new to the series of the series.

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Defendants' offer of employment and plaintiff's acceptance, marked Exhibits A and B, respectively, are attached to the complaint and the material portions read as follows:

## Exhibit "A"

"American Electric Fusion Corporation.

October 10th, 1942.

"Mr. Charles R. White.

"Dear Mr. White:

"This will confirm our mutual agreement for your

employment by this Corporation,

"You have been tendered, and accepted a position of Commercial Director, beginning your duties approximately November 1st, 1942.

"Your compensation will be as follows:

"Six thousand (\$6,000.00) dollars per year will be

paid to you by the American Electric Fusion Corporation.
"Additional six thousand (\$6,000.00) dollars will be paid to you by the undersigned from his commission account.

"Remaining three thousand (\$3,000.00) dollars will be paid to you as a bonus on Thanksgiving day of each year," this being the time when we usually distribute bonuses to other officials of this Corporation.

"I hope that your work with us will prove mutually

profitable, and assure you of my hearty co-operation.

"Very truly yours, "Edmund J. Henke, "President.

"Edmund J. Henke: deM

"#Except 1942,"

Exhibit "B"

"October 13th, 1942

"Mr. Edmund J. Henke, "President American Electric Fusion Corporation, "2600 Diversey Avenue, "Chicago, Illinois.

"Dear Mr. Henke:

"This is to acknowledge receipt of your letter of October 10th, 1942 which sets forth our complete agreement, and for which I thank you,

"I shall report for duty November 1st, 1942, or before--if I can discharge my present responsibilities sooner; for I am eager to begin what I feel will be a most productive as well as a very happy association.

"Sincerely yours, C. R. White."

Defendantal offer of employment and claimfiff.

seceptance, warred Trhibits a and E, respectively, are ottached to the complaint and the material surthers read as follows:

"A" didings

"American alectric Fuelon borotrablem.

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"aguer Agnat Edosa

".Samet .6 Faur 5." .Inoriesta

"Edgund J. Henky: SaM

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Exhibit "P"

Dotober lith, 1942

"Ar. Edmund J. Henks,
"President American Cleatric Fusion Corporation,

"2600 Diversey tvenue,

"Chicago, Illinois.

"Dear Mr. Hanke:

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"I shall report for duty kovember lat, 1948, or

before -- if I can discharge my present responsibilities sconer; for I am eager to begin what I feel will be a mort productive as well as a very happy as rociation.

"Sincerely yours, White,"

The corporation filed an answer which admits sending the letter Exhibit A and receiving from the plaintiff Exhibit B, but denies that said offer of employment was for the term of one year from November 1, 1942 or for any other term, and avers that said letter Exhibit A contained no definite term of employment whatever. The answer further avers that the plaintiff's services were unsatisfactory and that defendants therefore discharged him on December 17, 1942; that there was due the plaintiff the net sum of \$114.23 which was duly tendered to him as payment in full for his services rendered by him to and including December 17, 1942, but which plaintiff refused.

Defendant Henke in his answer denies that he, in writing, offered to and did employ the plaintiff, and alleges that any transactions concerning plaintiff's employment were with the corporation,

The evidence discloses that plaintiff and defendant
Henke had several discussions relative to the duties of plaintiff
as well as his compensation before sending the letters plaintiff's
Exhibits A and B; that with reference to the duration of plaintiff's
employment he testified that Henke said: "All right, if that
division of salary or the way it is paid to you is satisfactory we
will try it for a year." Henke testified that he "never told White
that he was hired for any definite period of time."

Plaintiff contends that the stipulation in Exhibit A of compensation at "six thousand dollars per year" and "a bonus on Thanksgiving Day of each year," when "read with plaintiff's testimony in mind," warrants the conclusion that plaintiff's employment was for a year.

Defendants maintain in their argument that the contract of employment did not fix a definite time during which it should

The corporation filed an enswer which a mits sending the letter Exhibit A and receiving from the plaintiff Exhibit B, but denies that seld offer of employment was for the term of one year from Movember 1, 1942 or for any other term, and avers that said letter Exhibit A contained no Lefinite term of employment whatever. The answer further avers that the plaintiff's services were unesticiatory and that defendents therefore discharged him on December 17, 1942; that there was due the plaintiff the net sum of sli4.25 which was duly tendered to him as payment in full for his services rendered by him to and including December 17, 1942, but which plaintiff refused.

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Plaintiff contends that the stipulation in Exhibit A of compensation at "six thousand dollars per year" and "a bonue on Thanksgiving Bay of each year, " when "read with plaintiff's testimony in mind," warrants the conclusion that plaintiff's employment was for a year.

Defendants maintain in their argument that the contract of employment did not fix a definite time during which it should

continue in force, and therefore was terminable at will.

In many states, courts have ruled that specification in the contract of an annual salary creates an inference of annual employment (100 A. L. R. 728), but in this state the rule has long been established that a hiring at a monthly or annual salary, if no period of duration is specified in the contract, is presumed to be at will and either party may terminate the hiring at his pleasure without liability. (Pfund v. Zimmerman, 29 III. 269;
Orr v. Ward, 73 III. 318; Davis v. Fidelity Fire Ins. Co., 208 III. 375; Chadwick v. Morris & Co., 170 III. App. 569; Marquam v.

Domestic Engineering Co., 210 III. App. 337; Odell v. Chicago Great Western Ry. Co. 212 III. App. 616; Fuchs v. Weibert, 233 III. App. 536.)

In his reply brief, plaintiff urges that defendants! letter, Exhibit A. "is simply a memorandum of an oral understanding and that it therefore became pertinent to inquire in our case as to just what the parties agreed upon, if it should be held that the memorandum has any latent ambiguity or omissions. We are unable to agree with plaintiff's position since his letter of acceptance, Exhibit B, states on its face that it is a complete expression of the whole agreement. Introduction of parol evidence by plaintiff, tending to prove a definite hiring for a year, was, in effect, an attempt to add another provision to the written agreement. Parol evidence cannot be admitted for this purpose. (Armstrong Paint Wks. v. Can Co., 301 III. 102, 106.) Nor does the omission of a specified date of termination of plaintiff's employment constitute an ambiguity. (Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 382.) The object of construction is to ascertain the intention which the parties have . expressed in the language of the contract. (Abingdon Bk. & Tr. Co. v. Bulkeley, 390 Ill. 582; Harley v. Magnolia Petroleum Co., 378 III, 19, 28,)

continue in forme, and therefore was terminable at will,

In seny states, course have ruled that apositionation in the contract of an annual suployment (100 f. 1. %. 728), but in this electe the rule has suployment (100 f. 1. %. 728), but in this electe the rule has long been established that a biring et a martaly or samuel relarly, if no period of duration is a solfied in the contract, is organised to be at will and either extry may beginned the liming at his pleasure without limitity. (\*\*rund v. \*\*legentry\*) 'S III. (\*\*\*); pleasure without limitity. (\*\*rund v. \*\*\*) the limitity in the limit in limit in the limit

is salaral a mid obtaining the salar and all letter, Exhibit s, "is object to were rendus of the area wadeder than and that if thereigh became continue of the in the our our our to just what the carties agr. on open, if it frould to selu that the e are uneble memorandum hes any latent versuity or oriesions. " to agree with electriff's region siers are isther of saceptane. Exhibit u, states un its face that is in a cos inte exercation or the whole agreement. Introduction of parel vicence in climnif., tending to prove a definite string for a year, was, in effoct, en strempt to add anchor oreview of the ritten a present, and evidence cannot be whatted for this rurpose. (frmetrops liths Was. v. Can Co., 501 Ili. 10, 106.; Wor ages the outgeten of a tusuified date of permination of plaintiff's amployment constitute an ambiguity. (Davie v. inelity tre Ire. Co., 208 Ill. 375, 382.) The object of even selfuse and double notineant and mintrages of at notionrance expressed in the lenguage of the contract. (Ablagdon Ez. & Tr. Do. v. Bulkeley, 390 Ill. 582; Karley v. Magnolia Petroleum Co., 378 III, 19, 28.) We have analyzed all the cases cited in the briefs and are of the opinion that the written agreement in the present case was an indefinite hiring, terminable at will, which alone warranted the trial judge in dismissing the suit. (Gage v. Village of Wilmette, 315 Ill. 328; First Mission Church v. Rockford Broadcasters, Inc., 324 Ill. App. 8.)

For the reasons given, the judgment non obstante veredicto is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

e have analyzed all the cases cited in the briefs and are of the opinion that the written apreciant in the present case was an indefinite airing, terminable at will, which airne warranted the trial judge in discharing the suit. (wege v. Yillage of dimette, 31 Ill. 703; itst wission flurch v. Scotford Broedensters, fur., 301 Ill. 400.

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KILTY, P.J. SN SERVE, A. CORTE-.

43182

HATTIE GABL,

Appellant,

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

V.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITES STATES, a corporation,

Appellee.

320 I.A. 128

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Hattie Gabl filed her complaint in chancery against the defendant, The Equitable Life Assurance Society of the United States, a corporation, for specific performance of the terms of certain group life insurance policies issued by the defendant to International Register Company, a corporation, for the benefit of its employees, among whom was one Frank Gabl, deceased husband of the plaintiff, and to perform an alleged agreement made after the death of the insured relating to the distribution of the proceeds of the insurance. The complaint alleges that the insured was of unsound mind when he changed the name of the beneficiary from plaintiff to his daughter. The cause was referred to a master and in conformity with the findings and recommendations contained in the master's report, the chancellor dismissed the bill of complaint for want of equity. Plaintiff appeals.

In June, 1923, defendant, The Equitable Life Assurance Society of the United States, issued a group life insurance policy to International Register Company (hereinafter called "Register company") insuring the lives of certain employees. During 1925 and 1926, Frank Gabl (deceased husband of the plaintiff) an employee of Register company, became insured in the sum of \$2500 under the terms of the policies issued by the defendant to his employer. Evidencing the insurance were three certificates which named Frank Gabl's mother, Caroline Gabl, as beneficiary, with the right reserved in the insured to change the beneficiary.

45182

HATTIE GABL.

Appellant.

THE DIVITABLE LIFE VANUE ANDE SOOTETY OF THE UNITED STATES, & corporation,

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GOOK COUNTY.

AR. JUSTICE LEWE DELIVE OF URS OFFICE OF THE COUPT.

Estie del filed hor communication chancery against the defendant, The Louitable Life securence tocaty of the United States, a corportible, for specific performance of the borne of of Inshipted ent yd come, solviler engament ell curra migree Invernational Register Company, a correction, for the benefit of its employees, among whom was one Princh Carl, decorred husband of the plaintiff, and to verious an alloged anterestrict and electer the death of the insured relating to the distribution of the propoeds of the insurance. The complaint elleges that the insured was of unsound mind when he changed the name of the caneficing from plaintiff to his 'sughter. The onuse was referred to a madter and in conformity with the findings and recommendations contained in the master's report, the chancellor Clemised the bill of complaint for want of equity. Plaintiff appeals.

In June, 1923, defendant, The Dault-ble bire Assurance Society of the United States, lesued a group life incurance policy to International Registor Com. any (hereinafter called "Remister company") induring the lives of certain employees. During 1925 and 1926, Frank Cabl (deceased husband of the plaintifi) an employee of Register company, became insured in the sum of \$2500 under the terms of the policies issued by the defendent to his eaployer. Evidencing the insurance were three certificates which named Frank Gabl's nother, Caroline Gabl, as beneficiary, with the right reserved in the insured to change the beneficiary,

On December 19, 1931, the plaintiff and Frank Gabl the insured were married, and on August 12, 1932 the beneficiary was changed from Caroline Gabl to plaintiff. Afterwards, on October 12, 1936, Frank Gabl again changed the beneficiary to Lorraine Gabl, his daughter by a former marriage who was then a minor. For almost a year prior to his death on July 4, 1937, Frank Gabl had lived separate and apart from the plaintiff. On July 10, 1937, plaintiff served a written notice upon the defendant and the Register company that. "Frank Gabl was not of sound and disposing mind at the time he changed the name of the beneficiary in said certificates; that undue influence was practiced in order to induce him to make the change". On July 19, 1937, the Probate Court of Cook County appointed Fred Gabl and Anna Funk guardians of the person and estate of Lorraine Gabl, the insured's daughter. On October 20, 1937, the defendants paid the full amount of the proceeds of the certificates to the guardians of Lorraine Gabl.

The gist of the complaint is that on and after May 10, 1936, Frank Gabl, the insured, suffered from hallucinations; that he voluntarily became a patient of Alexian Brothers Hospital in the city of Chicago and subsequently became a patient at Veterans' Administration Hospital at Hines, Illinois; that after he left the Alexian Brothers Hospital and before he entered the Veterans' Administration Hospital he became a victim of undue influence; that while of unsound mind he was induced to change the beneficiaries; that after the death of the insured the defendant proposed and the plaintiff agreed in writing that the defendant pay "jointly" the insurance money due under the certificates, to Lorraine Gabl and plaintiff, but that the defendant refused to perform the terms of the agreement. The complaint concludes with a prayer for specific performance of the terms of the insurance contract and the alleged agreement relating to the distribution of the proceeds.

On seconder 19, 1951, the plaintiff and Frank Gobl inc insured were married, and on August 12, 1932 the beneficiary was changed from Garaline Goll to plaintiff. Afternards, on Cotober 12, 1936, Frank oubl again changed the beneficiery to boreains cabl, his daughter by a forger martices who was then enterpr. or almost a year orior to ale death in July 6, 1987, Frank Gabl had lived ecoerate and abant from the laintiff. On July 10, 1907, plaintiff corved a vritten notice upon the an inchest the tac Register commany that, " renk Gabl se not of cound and disposing mind at the time he changed the noise of the theticity in valid cortificates; that unduc influence was practiced in order to induce him to meke the change". On July 19, 1827, the Probata Sourt of Cook County appointed and and Anas . wat supplians of the person and estate of largetic foll, the insured a daughter. On October 20, 1987, the defendente said the full emount of the proceeds of the certificates to the quardishs of Lorraine 'abl.

The giet of the completed from hallucin tions; that 1936, Frank Gabl, the insured, surfered from hallucin tions; that he voluntarily become a patient of Alexian prothers despited in the city of Chicago and subsequently become a patient at Veterans' Administration Hospital at Hiner, Illinois; that after he left the Alexian Brothers Hospital and before he entered the Veterans' Administration Hospital he become a victim of undue influence; that while of unsound mind he was induced to rivense the beneficieries; that after the death of the insured the defendent proposed and the plaintiff agreed in writing that the defendant pay "jointly" the insurance money due under the certificates, to lorraine Gapl and insurance money due under the certificates, to lorraine Capl and the expressent. The compleint concludes with a prayer for specific performance of the terms of the insurance contract and the alleged performance of the terms of the ordered and the proceeds.

Defendant filed two answers and counterclaims. The first counterclaim was in the nature of an interpleader, and the second prayed for the return of the proceeds of the insurance to defendant in the event the court should find that the change of beneficiary by the insured from the plaintiff to his daughter was invalid. The amended answer avers that the defendant had no knowledge of the alleged undue influence, mental incompetency or marital difficulties of the insured; that on October 12, 1936 the insured changed the beneficiary from plaintiff to Lorraine Gabl, his daughter; that due proof was made of the insured's death; that defendant admits it was notified by plaintiff that the change of beneficiary to Lorraine Gabl was the result of undue influence and the insured's mental incompetency: that defendant proposed to make settlement jointly with the plaintiff and Lorraine Gabl, but that the plaintiff refused said proposal and in lieu thereof offered a counterproposal that the defendant divide the proceeds equally between the claimants; that the guardians appointed for the estate and person of the minor, Lorraine Gabl, rejected defendant's proposal to make joint settlement, and demanded the entire proceeds of the insurance; and that the defendant, having been presented with evidence on behalf of the minor, Lorraine Gabl, that Frank Gabl, the insured, was same when he executed the change of beneficiary, it paid the entire proceeds to the guardians of Lorraine Gabl.

The master in chancery found that plaintiff's evidence failed to show lack of mental capacity of Frank Gabl on October 12, 1936, the date on which the insured requested the change of beneficiary; that no evidence was offered by plaintiff tending to prove that the change of beneficiary was the result of undue influence, and that there was no agreement to divide the proceeds of the insured's certificates equally between the plaintiff and Lorraine Gabl, and recommended that the complaint be dismissed

Defendant filed two snawers and countereld as. The first counterold a was in the nature of an interplander, and the second prayed for the return of the proceeds of the insurance to defendant in the event the court should find that the obsence of beneficiary by the insured from the plaintiff to his doughter was invalid. The amended answer avers that the defendant had no knowledge of the alleged undue influence, monthl incompetency or marital difficulties of the insured; that on October 19, 1986 the insured emanred the beneficiary from claintiff to horraine Gabl, his daughter; that due proof was made of the insured a desth; that defendant eduits it was notified by plaintiff that the chance of beneficiery Detrance and the secondary sound to flower and they debe enterned of mental incompatency; that defendant proposed to aske settlement jointly with the plaintiff and borraine habl, but trat the plaintiff refused seid proposal and in lisu thereof offered a counterproposal that the defendant divide the proceeds equally outreen the claimage; that the guardians appointed for the estate and person of the minor, iorrains Gebl, rejected defendant's proposal to make joint settlement, and demanded the entire proceeds of the insurance; and that the defendant, baving been presented with evidence on behalf of the minor, Lorraine Gabl, that Frank Cabl, the insured, was sane when he executed the change of beneficiary, it paid the cutire proceeds to the guardians of Lorraine Gabl.

The master in obanoery found that plaintiff's evidence failed to show lack of mental capacity of Frank Gabl on October 12, 1956, the date on which the insured requested the change of beneficiary; that no evidence was offered by olaintiff tending to prove that the change of beneficiary was the result of undue influence, and that there was no agreement to divide the proceeds of the insured a certificates equally between the plaintiff and formains dabl, and recommended that the complaint be dismissed

for want of equity. The chancellor overruled the plaintiff's exceptions to the master's report and followed his findings and recommendations.

Two questions are presented: first, whether Frank Gabl, the insured, was mentally incompetent to change the beneficiary of his insurance from plaintiff to Lorraine Gabl, his daughter; and, second, whether defendant entered into a valid agreement with plaintiff after the death of Frank Gabl, the insured, which entitled her to any of the proceeds of the insurance.

As to the first question, plaintiff's principal contention is that the master erred in placing greater weight on the testimony of lay witnesses introduced by the defendant than on the testimony of the two psychiatrists introduced by the plaintiff. The plaintiff introduced the testimony of four witnesses, including her own.

Dr. Leo J. Latz, called in behalf of plaintiff, testified substantially that Frank Gabl, the insured, was under his care at Alexian Brothers Hospital from November 30, 1936 to December 7, 1936; that he was "suffering from an arteriosclerotic condition of the brain and an alcoholic brain condition with disturbed mental condition," and that in his opinion Frank Gabl was "not capable of understanding the nature of a change of beneficiary of a life insurance policy."

Dr. Walter Zurndorfer, called by the plaintiff, testified that he treated Frank Gabl from June 12, 1936 to June 26, 1936 at Alexian Brothers Hospital; that he subjected him to various tests which disclosed chronic nephritis and decreased function of the kidneys; that Gabl expressed fear that someone was after him; that the "psychosis consisted of constant fear and apprehension that somebody wanted to hurt him"; that Frank Gabl had either developed or had a psychosis and that he was not capable of executing a change in the beneficiary of the insurance certificates in question on

for want of equity. The chardellor over-caled the plaintiff's exceptions to the master's record and followed his findings and recommendations.

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Dr. Walter Carndorfer, called by the plaintiff, testified that he treated Frank Uabl from June 12, 1236 to June 28, 1936 at Alexian Brothers Hospital; that he subjected bin to various tests which disclosed chronic nephritis and decreased function of the kidneys; that Gabl expressed fear that someone was after him; that the "psychosis consisted of constant fear and apprehension that semebody wanted to hurt him"; that Frank Gabl had either developed or had a psychosis and that he was not capable of executing a change or had a psychosis and that he was not capable of executing a change in the beseficiary of the insurance certificates in question on

October 12, 1936. The record further discloses that Frank Gabl left the hospital without the permission of Dr. Zurndorfer and that he had Gabl execute a release in favor of the Hospital when he left. On cross examination the witness admitted that Frank Gabl "was capable of understanding the nature of what he was signing." It is undisputed that the clinical records of Alexian Brothers Hospital do not show any reference to psychosis or other mental disturbance of Frank Gabl.

Plaintiff testified that her husband, Frank Gabl, "imagined that people were behind him all the time, that someone was trying to do him out of things, and someone was trying to rob him all the time"; that "he would be all right for a week or ten days and then the same thing would start"; that "from August 12 to August 26, 1936, some times he acted like a normal person, and some times he did not"; and that on August 26, 1936 Frank Gabl, her husband, accompanied by his daughter, Lorraine Gabl, went to live with Ann Funk.

Plaintiff's last witness was Charles J. Russell, whose name appeared as the attorney of record in this cause for the plaintiff. He withdrew his appearance for the purpose of testifying in behalf of his client.

Fourteen witnesses testified for the defendant that Frank Gabl was of sound mind on October 12, 1936; among them were two doctors and four fellow employees of the Register company.

Dr. M. P. Bailey testified by deposition that he had practiced neuropsychiatry for twenty years and was a neuropsychiatrist at the Veterans' Hospital at Montgomery, Alabama, since November 1940; that his previous assignment was at the Veterans' Hospital, Hines, Illinois, from April 1935 to November 1940; that he treated Frank Gabl at the Veterans' Administration Hospital at Hines, Illinois, from March 13, 1937 to March 23, 1937; that when he first examined him

October 12, 1856. The record further disclores that Frank ablight the Lespital without the cermission of Ir. Juredorfer and that as had Cabl execute a release in favor of the Hospital when ne loft. On cross examination the without admitted that Frank Gabl "was capable of understanding the nature of what he was algning." It is undisputed that the clinical records of Alexian Brothers Hospital do not show any reference to psychosis or other mental incurbance of Frank Cabl.

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on March 13, 1937, he was mentally confused and unable to transact business; that his mental condition improved gradually, and that at the time of his last examination on May 23, 1937 he had recovered entirely from his mental confusion and was mentally competent; that he considered the disease an acute alcoholic manifestation, as the patient quickly recovered from the acute symptoms and at a final examination on March 23, 1937, "he was not tremulous, had recovered from his mental confusion, and the mental examination showed him to be mentally competent."

Dr. William H. Haines, called as a witness for the defendant, testified that he specializes in nervous and mental diseases and has an office in the Behaviour Clinic of the Criminal Court of Cook County, located at 2600 South California Avenue in the city of Chicago; that he examined the records of Alexian Brothers Hospital; that he is familiar with the methods by which records of patients are kept at various hospitals and has had occasion to examine several thousand; that he based his opinion on the charts, which contain the history the patient gave to the examining intern or doctor at the time, including also the physical and the laboratory examination; that there was no definite information on the charts indicating any mental aberration of the patient at the time; that he did not find anything on the records at the time he examined them to indicate that during the periods mentioned the patient was suffering from delirium tremens; that delirium tremens is an acute condition, usually lasting a few days or a few weeks, "it clears up or the patient dies"; that the individual may have several attacks of the condition, but it is characterized by recovery. In response to a hypothetical question recounting all the symptoms of Frank Gabl as shown by the clinical records of the hospitals as well as his conduct during the period of his employment, the witness stated that in his opinion

on Merch 13, 1957, he was mentally confined and unable to transact business; that his mental condition ingreved andmelly, end that at the time of his lest examination on day '15, 3 of he had decovered entirely from his neated confusion and the tentulty consettops; that he considered the disease an soute alcoholus suffestation, we the patient culckly recovered from the soute symptems and at a stock examination on March '15, 1977, "his ere not transployed, but recovered from his mental confusion, and the dense examination shows him to be mentally competent."

ur. Villiam . Fines, called as a witness for the defendant, testified that he aregister a to derrous and cent-1 diseases and has an office in the Sabevicur libric of the Original Court of Gook County, longing at 2300 South 7 liferals Avenue in the city of Chicago: that he examined the resords of lexian Drothees Hospital; that be in familiar with themethode by which records of eminess of noisence had ead bow eladicand appirary is form are aineliso several thousand; that he based his opinion on the charts, which contain the history who cations gave to the exeminism interm or doctor at the time, including also the obysical and the laboratory readmention: that there was no definite information on the charts indicating any mental aborration of the patient at that that the he did not find anything on the records at the time he aremined them to indicate that furing the periods mentioned the pattent was sufforing from delirium tremens; that delirium tramens is an acute condition, usually lasting a few days or a few weeks, "it clears up or the patient dies"; that the individual may have several attacks of the condition, but it is characterized by recovery. In response to a hypothetical question recounting all the eymptems of Frank Cabl as shown by the clinical records of the hospitals as well as his conduct during the period of his employment, the witness stated that in his coinion the insured was mentally competent on October 12, 1936.

Defendant's witnesses William J. Volkins. Bertram E. Beach, Alpha B. Spillman, and Ernest Gage, were all fellow employees of Register company during the period of the insured's employment. Volkins testified that he had been in the employ of Register company for 45 years and had charge of filling out forms and other duties relating to the group life insurance of the employees of Register company; that he had seen the insured, Frank Gabl, at least once a week during the 12 years preceding his death; that the insured was present in his office on October 12, 1936, when the change of beneficiary was made, and that in his opinion Frank Gabl was "capable of understanding the nature and effect of the change of beneficiary." The witnesses Beach, Spillman and Gage all testified that they had seen the insured at work every day for varying periods ranging from nine to ten years: that he was a capable workman and appeared to them to be of sound mind. Other witnesses called in behalf of defendant were acquaintances and relatives. They testified in substance that the insured was mentally competent on October 12, 1936 and thereafter until he died on July 4, 1937.

Estate of Dombrowski, 321 Ill. App. 300, 53 N. E. (2d) 18, and Britt v. Darnell, 315 Ill. 385. These cases hold in effect that witnesses who are not experts cannot testify upon the question of mental competency unless it appears that they have sufficient acquaintance and opportunity to judge the mental capacity of the person whose competency is questioned. They have no application in the case at bar, since the record discloses that the lay witnesses testifying for defendant had many years of intimate and daily contact with the insured. To relate the testimony of all these witnesses would unduly extend this opinion. Despite the conflicting evidence, we think the testimony bearing on the question of the mental competency of Frank Gabl to change the name of the beneficiary

the insured was mentally competent on October 15, 1936.

Defendent's witnesses William J. Volkins, Sertram ... Besen, Alpha B. Spillmen, and Ernert Gage, were all fellow exployees of Register company during the period of the insured a employment. Volkins tentified that he as seen in the employ of Testator company for 45 years and had oberes of filling out forms and other duties retained to see organished insurance of the exployees of centister company; that he had seen the insured. Frank Gabl, or least cace s wook during the 12 years preceding his death; that the insured was present in his office or October 12, 1856, when the change of beneficiary was made, ont that in his opinion Frank (shi was "capable of understanding the nature and effect of the cornge of peneficiery. " The witnesses Bosen, outilian and wave all testified that they bad seen the insured at work every ter verying cerious renging from nine to ten years; that he were a capable workman and appeared to them to be of sound wind. Other witherses called in behalf of defendant were sequentationed and relatives. "hey testified in substance that the incured was nextally computent on October 12, 1936 and thereafter until he died on duly 4, 1987.

In plaintiff's brief counsel cites the cases of In reEstate of Dombigwail, 381 III. App. 201, 65 N. W. (24) 18, and
Britt v. Dernell, 316 III. 385. These cares hold in effect that
witnesses who are not experts cannot testify upon the cuestion of
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testifying for defendent had many years of intimate and daily
contact with the insured. To relate the testimony of all these
witnesses would unduly extend this opinion. Despite the conflicting
evidence, we think the testimony bearing on the question of the

preponderates clearly in favor of the defendant, and that the master's findings were amply justified.

Plaintiff's second contention is that certain letters (Plf's Exhibits 22, 24, 25,27 and 29) appearing in the additional abstract of record constitute the agreement to divide equally the proceeds of the insurance between plaintiff and Lorraine Gabl the beneficiary named in the certificates. This contention is without merit. Plaintiff's Exhibit 29 is the last letter addressed by defendant to plaintiff's attorney relating to the payment of the insurance proceeds. The pertinent portion of this exhibit reads as follows: "The guardian has made claim for full proceeds of these certificates for the beneficiary of record [Lorraine Gabl] and is not disposed or authorized to accept or be a party to any joint settlement with your client. " Reasonably construed, this language shows that the guardians of Lorraine Gabl, the insured's daughter, refused to make a division of any of the proceeds with the plaintiff. We have examined all the exhibits carefully and cannot extract an agreement from them. In plaintiff's reply brief, counsel argues that Lorraine Gabl "never had a voice in the matter so that she could make a decision or recommendation, " That question, as well as the conduct of her guardians, is not before us. We have not discussed the other points presented in plaintiff's briefs, some of which are outside of the record, since it has not been necessary for disposition of this cause.

For the reasons stated, the order of the chancellor dismissing the bill of complaint for want of equity is affirmed.

AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

preponderates clearly in fever of the coleman, nd is the asser's findings were amply justified.

Plaintiff's second content on at their certain leaders (Piffs axhibits 22, 24, 55,07 and 13) soceasing in the additional and vilours of the open some and statificated increasing to team ade and flow and the insurance recovery that the absorption and the absorption beneficiary named in the destition tow. That are tentent on it with ut merit. Flaintifi's Limicit as to the Totalli Johanna or well to theaven ent of politeion generate attributate of temberales insurance proceeds. Inc partiment contion of this orbibit cards ... Collows: "The cuardian has gade claim (or bull recessed of these corrected for first ordered, concern to predict the first order and income disposed or authorized to accept or be a narry to any joint setulement with your elient. " escapsuly chairmed, this lyneusgs enaws thru the guardians of Lorraine - 6 1, the instruct - at liter, retured to make a division of any or ". e arroweds with the thinking a flate Juana tan de Joerika t mu t had y listerts at Mider and lie Bonimers from them, In claimfil conly brief, comment argued that Lorraine Gabl "never had a volce in one netted so that she could nake a decision or recommendation. " That ruselica, as well as the conduct of her guardinas, is not perpose us. . . be have not discussed the other points precented 'n mlaintiff's brisfs, arms of which are outsine of the record, since it has not seen necessary for discosition of this cause.

For the reasons stated, the order of the obtacellor dicmissing the bill of complaint for tent of equity is affirmed. AFFIRMED.

KILHY, P.J. AND PURKA, J. CONCUR.

43204

LeROY PAUL, alias LeROY POLLOKOFSKI,

Appellant,

V .

SAMUEL A. STRITCH, D.D., Archbishop of The Roman Catholic Church of Chicago, a corporate sole, and LORETTA PAUL, alias LORETTA POLLOKOFSKI,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

LeRoy Paul filed his amended complaint for an accounting against his sister Loretta Paul and "Samuel A. Stritch, D. D., Archbishop of the Roman Catholic Church of Chicago, a corporate sole" and which defendant filed an appearance as "The Catholic Bishop of Chicago, a corporation sole," hereinafter called "corporation sole." The chancellor sustained the corporation sole's motion to strike and dismissed the amended complaint. Plaintiff appeals.

The gist of the amended complaint is that the plaintiff's parents, Fred Paul and Margaret Paul, his wife, owned certain real estate in the City of Chicago which they had purchased from one Mary Elser; that on January 12, 1929 Margaret Paul, plaintiff's mother, died; that on February 16, 1929 Fred Paul, plaintiff's father sold the real estate in question for \$25,000 at the beheat of Benjamin Elser the husband of Mary Elser; that afterwards Fred Paul and Benjamin Elser orally agreed to create a trust for plaintiff and his sister which provided that \$20,000 was to be held in trust for them until they attained their majorities, when they were to receive \$5,000 each, and the remainder was to be expended for their board, lodging and tuition during their minority; that on December 28, 1929 plaintiff's father executed a trust agreement designating the Chicago Title and Trust Company as trustee, incorporating the terms of the oral agreement: that on or about January 1, 1941 plaintiff's father, Fred Paul, learned that Elser, contrary to terms

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Leroy Paul, alins [agoy Filing ]

Appel ant,

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Samuel A. Stritch, C. . , archbishop

of The Roman Gerbolle Church of

Chicago, a corporate sola, and
LORETTA Paul, alias Louring

Pollokoffski,

Appellers.

\$2.566

PROPORTION OF THE RELEASE OF THE STATE ACCOUNTS FOR

Lestoy Feed filed bis sponded complaint for an accounting against his slater topetty Deul and "Samu 1 &. Stritch, '. D., Archbishop of the Asakn Satbolin Thursh of anticks, a corropate call and which defendent filed on appresence as "The actuality Bishop of Obiosgo, a corpor than sole," hereinsteen called "epropatition cole," The chancellor sustained the corporation actors action to strike and dismissed the mandel complaint. Leight apprehens.

The gist of the eachded complete the that the claimitff a parents, Fred Peul and Margaret Wall, bl. dir, owned certain real estate in the City of Ghiongs which thy has surchesed from one surp Ficer; that on January 12, 1979 Hargaret Paul, blaintiff's mother, died; that on February 10, 1989 Fred Paul, elaintiff's father sold the real estate in question for PE,000 at the behast of Denjemin Miger the husband of Mary Miser; that afterwards fred Paul and Benjamin Elser orally agreed to create a trust for elemniff and his sister which provided that . 20,000 was to be held in trust for them until they attained their majorities, when they were to receive \$5,000 each, and the remainder was to be expanded for their board, lodging and tuition during their minority; that on December 28, 1929 plaintiff's father executed a trust agreement designating the Chicago Title and Trust Company as trustee, incorporting the terms of the oral agreement; that on or about January 1, 1941 plaintiff's father, Fred Paul, learned that Elser, contrary to terms of the alleged oral agreement, had fraudulently deposited the money with the corporation sole without revealing his agency to it; that certain moneys were advanced by the corporation sole to plaintiff for board and hodging and in the form of cash. The amended bill concluded with a prayer for a judgment against the corporation sole for \$5,000 "plus any income received therefrom" and an accounting of the other \$5,000. Loretta Paul, plaintiff's sister, has not filed an appearance.

The amended bill is based upon the theory that the plaintiff's claim is due under an oral agreement between his father,

Fred Paul and Elser. Defendant contends that it fails to state a cause of action predicating liability against it. Plaintiff does not seek to set aside the trust agreement between Benjamin Elser and the corporation sole. Elser is not made a party to the proceeding though the fraud, if any, was committed by Elser. Although plaintiff's father knew of the trust agreement between Elser and the corporation sole in January, 1941, no action was taken by him or his legal representative to disaffirm it. So far as appears from the record, the corporation sole has complied with the terms of the trust agreement between it and Elser. It does not appear that the \$20,000 deposited with the corporation sole represented the proceeds of the sale of the real estate owned by plaintiff's father.

In effect plaintiff is endeavoring to modify the terms of a written agreement to conform to the terms of an alleged oral agreement between Elser and the plaintiff's father, to which the corporation sole was not a party. From the allegations of the bill it does not appear that the corporation sole had any knowledge of the alleged oral contract, nor is it charged with participating in the fraud.

Taking the allegations of the amended complaint as true,

of the alleged oral agreement, had fraudulently deposited the money with the corporation sole without revealing his agency to it; that certain moneys were advanced by the corporation sole to plaintiff for board and hodging end in the form of cash. The amended bill concluded with a prayer for a judgment against the corporation sole for 76,000 "plus any income received therefrom" and an accounting of the other fa,000. Loretta Paul, plaintiff's sister, has not filed an accounting of the other.

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Taking the allegations of the amended complaint as true,

as we must, in considering defendant's motion, we think plaintiff fails to state a cause of action against the corporation sole.

For the reasons given, the order, sustaining defendant's motion to strike and dismissing the plaintiff's amended complaint, is affirmed.

AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

as we sust, in considering defendant! a motion, we think plainfill fails to state a cause of action against the corporation sole.

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For the reasons given, the order, sustaining defendant's motion to strike and dismissing the plaintiff's emended complaint, is affirmed.

AFFIRMED.

KILOY, P.J. AND PURE J. CONCUR.

43454

LUDMILLA STAPEL,
(Plaintiff) Appellant,

٧.

JULIUS KANWISCHER et al.,
Defendants.

JULIUS KANWISCHER, (Defendant) Appellee.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

323 I.A. 130

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of forcible entry and detainer against defendants before a justice of the peace to obtain possession of certain real estate which she had purchased and which was occupied by defendants. The justice entered judgment for defendants. Upon appeal to the Circuit court there was a trial de novo before the court without a jury and a finding and judgment in favor of defendants. Plaintiff appeals. Julius Kanwischer, defendant, is the only appellee who entered an appearance and filed a brief in the cause.

Upon the trial defendants admitted that plaintiff was the owner of the premises in question, commonly known as 1354 Brown street, Des Plaines, Illinois, which she purchased from Olivia K. Moldenhauer, the widow of Dr. William J. Moldenhauer, on February 7, 1944. After plaintiff purchased the property she obtained a certificate from the Office of Price Administration authorizing her to evict the tenant of the premises provided the action to evict was not commenced sooner than three months after July 13, 1944. Plaintiff caused a written notice to be served upon defendant Julius Kanwischer informing him that his tenancy would terminate October 31, 1944, and demanding that he quit his occupation

LUBELLE ST.PSL, (Pleintiss) .g. sllant,

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JULIUS .ANGISCHER et al.

JULIUS KAINTICHTE, (Befordant) pyellee.

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Plaintief brought an action of furnible cuber and detainer against tolerable before a function of the jetoe to obtain possession of seriain real estate with also had juried obtain possession of seriain real estate. The function obassed and which we occupied by derivadints. The finalest antered fudgment for defaultable. Then appeals to the till first and a finding one fully alone the finding one fully and an isoher, derendent, is the only the appeals who entured an occupie and filed to the finding an occupie and filed to the finding appeals and contents and contents and contents and occupied an appealance who entured an appealance and filed to the finding cause.

Upon the trial defendants admitted that plaintiff was the owner of the presises in question, commenty known at 154 Brown street, Nes Plaines, Illinois, which she purchased from Olivia I. Roldenhauer, the widow of ur. Filliam J. Noldenhauer, on Petrusry Y, 1544. Ther plaintiff purchased the property she obtained a certificate from the office of Price Administration authorizing her to evict the tenent of the premises provided the action to evict was not commenced of the premises provided the action to evict was not commenced caused a written notice to be served upon defendant Julius Caused a written notice to be served upon defendant Julius Caused a written notice to be served upon defendant Julius Caused a written notice to be served upon defendant Julius Caused a written notice to be served upon defendant Julius Caused a written notice to be served upon defendant Julius Caused a written notice to be served upon defendant Julius Caused a would terminate

of the premises as plaintiff wished to occupy the same as her home. Upon his failure to quit possession the instant proceedings were started.

The sole defense to the action was that defendant Julius Kanwischer had a better right to the possession of the premises than plaintiff by virtue of a certain written lease, dated December 20, 1935, and he was allowed to introduce in evidence, over the objection of plaintiff, what purported to be a lease for the premises. The term of the lease commenced January 1, 1936, and terminated January 1, 1947. In the body of the lease the lessor is described as "Minnie Moldenhauer agent for William J. Moldenhauer," and the lease is signed, "Minnie Moldenhauer, Agent for Wm. J. Moldenhauer (Seal)." Julius Kanwischer, defendant, testified that he occupied the premises under that lease since its execution and that he had paid the rent to Minnie Moldenhauer for eight years; then to Mrs. Stapel for six months; that he and Minnie Moldenhauer signed the lease. Minnie Moldenhauer, called by defendants, testified that she was a sister of Dr. William J. Moldenhauer, the former owner of the property, who died June 30, 1942; that she wrote the said lease in duplicate and signed it, she thinks, on the date that it bears; that she gave one copy to Julius Kanwischer and she kept the other copy; that after executing it she placed her copy in her safety deposit box, where it has been ever since; that she did not keep all of Dr. Moldenhauer's papers in that box; that after his death she gave some of his papers to his widow, Olivia Moldenhauer, and the remainder to the latter's attorney, Mr. Rosin; that she did not turn over the lease to either of them and that she still has it in her box. At the conclusion of her testimony plaintiff moved to exclude the lease, upon a number of grounds, of the tramises as plantiff dahe to occupy the sine sher home. Upon his failure to just perseasant in deathat proceedings were stated.

The sole difference the action of that sevendent Julius larvitather had a better right to the policemion of the essel matter at two o to outsive to Tributial and assistant dated Decomper 20, 1935, and he was allowed to incroduce in evidence, over the objection of " in iff; hat proceed to be a lease for the promises. The tour of the let a sor succeed January 1, 1936, and Semilimbed Truery 1, 1.49. In the body of the lease the lessor is described as "inde | elderiamer ejent for Allian C. of abouter," and the le is lyned, Tiunie Toldoniauer, ... cht for .. 7. olienbener (Beal). ! Julius .naisaher, infandunt, totified that he occorded the premises under that I are ince its production of the lad poid the rant to involve olderhead of the radiation of the rand to Tel. Stapel for the more, ; that he am isn's elicitent signed the least. Them Followings; allos by defrontents, tratified that the tory statem of Pa, Milliam F. Folyeminuter, the former owner of the property, the died dune if, ip.k.; that the crote the said I ase in impliance and oigned it; she thinks, on the date that it bears; or the gave one copy to Julius Manwischer and she hopt the other copy; that after executing it she places her copy in the a fety deposit bor, where it has been ever since; that she did not keep all of Pr. Moldemhauer's papers in that box; tint after his death she gave some of his papers to his widow, Olivia Moldenhauer, and the remainder to the latter's attorney, ir. Rotin; that she did not turn over the lease to either of them and that she still has it in her bex. At the conclusion of her testimony plaintiff moved to exclude the lease, upon a number of grounds, but for the purposes of this appeal we need notice one only, viz., that there was no written proof of the agency of Minnie Moldenhauer to sign the lease. The trial court refused to exclude the lease.

It is the law that a party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted. (See <u>Foster v. Graf.</u> 287 Ill. 559, 562.) The Statute of Frauds of this State (ch. 59, sec. 2, Ill. Rev. Stat. 1945) provides:

"No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party. \* \* \*"

"Where the Statute of Frauds requires that the memorandum of a contract for the transfer of an estate or interest
in lands, etc. must be signed by the party to be charged, or by
someone by him lawfully authorized in writing, the authority
must be conferred by writing, and, in the absence of a ratification
by the principal, a memorandum of a contract executed by an agent
acting under parol authority is void and of no effect." (27 A.
L. R. 607.)

In Rogan v. Arnold, 233 Ill. 19, 21, it was held that to bind a principal to a lease, under seal, signed by another as agent of the principal, there must be evidence that the agent was authorized in writing to execute it. Counsel for defendants rely upon the doctrine of ratification. The general rule is that when the adoption of some form of procedure is necessary to confer authority in the first instance there can be no valid

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It is the Lambert, posty who evails inhabile of the act of a segent smat, in or so to charge the ministral, provethe act of actionity ander match the spent acted. (Not Notice v. Creft, 287 111. 579, 562.) The Statute of Status of this tate (ch. 59, sec. 1, 111. sec. itat, 1989) provides:

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ratification except in the same manner. (See 2 C. J. S. pp. 1088. 1089.) Minnie Moldenhauer did not claim that she had written authority from Dr. Moldenhauer to sign the lease. Indeed, she did not claim that she had oral authority to do Her testimony shows that she never delivered the lease to Dr. Moldenhauer and it fails to show that she ever spoke to him about the lease. She did not even testify that when Julius Kanwischer paid her the rent she gave the same to Dr. Moldenhauer. but, if it be assumed that she did, nevertheless, there is no testimony to show that when Dr. Moldenhauer received the rent from her he knew that he was receiving it under the lease. Neither Olivia Moldenhauer nor plaintiff ever saw or heard of the lease. The trial court and defendants' attorney were of the opinion that the lease itself, coupled with the evidence of Julius Kanwischer that after the execution of the lease he "paid rent to Miss Moldenhauer for eight years" and that since plaintiff acquired the property "I have paid rent to Mrs. Stapel, the plaintiff in this case," proved a ratification of the lease and made out a complete defense to the action. The trial court admitted the lease in evidence upon that theory, disregarding the undisputed evidence that Olivia Moldenhauer and plaintiff never saw or heard of the lease when they accepted rent for the premises, that Dr. Moldenhauer never saw the lease, and there is no evidence that he ever heard of it. If the court's theory of the law were sound it would be impossible for a principal to escape responsibility for any unauthorized act of his agent. Kanwischer, defendant, in his brief, makes a feeble claim that plaintiff "recognized the lease by accepting rent from him [Kanwischer]." Olivia Moldenhauer testified that she never knew that there was such a lease, and there is no proof to rebut that statement. Plaintiff offered to prove by a number of witnesses that before she bought the property Julius Moldenhauer

mattriorition second in the same nerther. .... ... 1029, 1039.) When to to emissor aid no said that and had written authority from Mr. Mollonisher ed righ the leade. Indeed, she did not that the bold had ored a condity to do Her tentiment the time of never lelivared the lease to Er, Moldenhauer em it felle to stok bind de ever spoke to id. about the lease. The Line not even testify that them bilius englacion poil hor the ren' the gave the same to fr, l'oldenimater, but, if it be assumed that the did, nevertheless, it to it in teatimony to shee that who mile, Holderic were rearrived the gratt from hor in important is the real relation in aniar that is so. Teither Clivin Holden'n ver nor plaintiff evic and of land of the leane. The tries out t and lateral ats . Such a corn of the opinion that the leave fibrall, congles this the evil nee of Palius Manches that often the earth to the Land of the Land he "paid rent to Mas Loldam's not some how the to the rent and the chart Liegada lama ed dom ling of 1 15 yday ong old belinger illianining the plaintiff in this disc," proven a matification of the least and lade out a solution define up the retief. The frield learns admitted the large in vilence whom then throng, theregording the undisputed originate that Clivia Mallania were and original edf to found to ten to the lease with the ten as were saved promises, that Dr. Roldenhauer nover say the lease, and there is no evidence that he even heart of it. It the country theory of of forther a not chalancest od bisow it beson show was suit essage responsibility for any unauthorized of of his , jent. Hanvischer, defendant, in his brief, n. kos . . coble claim tiet plaintiff "recognized the loase by accepting pent from him [Kanwischer]." Olivia Moldenhauer testified that she never knew that there was such a lease, and there is no proof to rebut that statement. Plaintiff offered to prove by a number of witnesses that before size bought the property Julius Mcldenhauer

stated to her that there was no lease upon the premises, but the court, upon objection by defendants, held that such evidence would be incompetent. Maria Gross testified that a month before plaintiff bought the property, the witness, plaintiff, Julius Kanwischer and Minnie Moldenhauer were in the home of the latter, and in a conversation that took place there Julius Kanwischer and Minnie Moldenhauer both stated there was no lease upon the premises. This evidence, upon motion of defendants, was stricken. Plaintiff also offered to prove that in March, 1944, Julius Kanwischer asked her if she would execute a lease for him for the property so that he could be a tenant under a written lease; that before she bought the property she asked Julius Kanwischer and also Minnie Moldenhauer if there was a written lease upon the premises and that they both stated that there was not. Upon objection of defendants the court refused to allow the evidence. The trial court erred in refusing to admit the evidence offered by plaintiff, erred in admitting the alleged lease in evidence, and further erred in not entering judgment for plaintiff.

Plaintiff strenuously contended in the trial court, and contends here, that the lease is a fraudulent one; that it was drafted and signed after plaintiff became the owner of the real estate and after she refused to give Julius Kanwischer a lease to the premises, and she offered evidence in support of her contention. It seems hardly necessary to state that if the lease offered by defendant is a fraudulent one the entire defense would fall. The trial court seemed to regard the offered evidence as of no materiality, and, without any justification for so doing, he treated plaintiff's young attorney harshly when the latter sought to introduce proper evidence in support of the contention that the lease was a fraudulent one. In spite of the fact that the court improperly excluded most of the said

stated to her det there was no less up of the great to bet the court, upon of fection by defend site, tall that a consta fait lai ite a accom ling. . Jastegreent en bluer eoneb month before it intificed to the property of ithous, which a real class of a first of decision as the first of the first of the control of the contro the home of the litter, and in a conversalitar it tile nakentee there Julius Fandi on a Lad day le old minuter built of thed there was no leade upon des grandets. This syl not, an ablem of defendants, a a china see. I indicte absolution to the two the in tareh, 1944, talinn tari eber eta italia eta ilareh a lease for his solution of the complete of the solution of the and the page of the bosons of the country page for the the page and the same erall the core to the color of the train of the contract below bedate the grant all a granting only room can I ardilar a sem Fre objection of d. C. n. into the congr that there was not. refused to all m the even hard and a sure live of mile of bearing fisher to shift the even mis entried by politically a seed in at board added in , car through each to got another a . Chantily rot one git; pairsons for

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her contention. It somes handly a creaty so at its that if the
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so doing, he treated plaintifi's young atterney harshly when
the latter sought to introduce proper evidence in support of
the latter bought the lease was a frondulent one. In spite

evidence offered by plaintiff, there are certain facts in the record that tend to support plaintiff's contention. Olivia K. Moldenhauer, the widow of William J. Moldenhauer, testified that she never heard of the lease although Dr. Moldenhauer died June 30, 1942, and she owned the premises until February 7, 1944, when she deeded them to plaintiff. Minnie Moldenhauer testified that she kept her copy of the lease in her safety deposit box from the time of the execution of the same in 1935 until the time of the trial, although she delivered the other documents that she had in her possession that belonged to Dr. Moldenhauer to Olivia K. Moldenhauer or her attorney, but that she did not deliver the lease to either of them. The lease is an unusual one. It purports to give Julius Kanwischer an eleven year lease of a residence in Des Plaines. There is evidence that Olivia K. Moldenhauer, after the death of her husband, took away from Minnie Moldenhauer the management of certain of the real estate, including the premises in question, that had belonged to him. The evidence warrants the conclusion that plaintiff would not have bought the property if she had known that there was a lease upon it. If the alleged lease was not a fraudulent one, why was its existence kept a secret for many years? Why was it not turned over to Olivia Moldenhauer when her husband, Dr. Moldenhauer, died and she became the owner of the property? All of the evidence offered by plaintiff that tended to support her claim that the lease was a fraudulent one was competent, and should have been admitted. To some of the evidence offered the court ruled that a proper foundation had not been laid for the evidence. We take it that the court was of the opinion that impeaching questions would have to be first put to Kanwischer before the offered evidence would be competent. The rule that the trial court had in mind does not apply to the parties to a suit. The offered evidence was competent against Kanwischer,

evidence off red by p lintiff, the ere wert in flatt in the record that tend to support plaintill's contention. Clivia ... Moldenhauer, the wider of Hilliam J. Foldenhauer, testified that she never heurd of the lease although or. Holderhauer died June 30, 194., and she orned the premises until retructy R 1964, when he wered them to plain iff. Timie olderinater testified that use kept her capy of the basse in her safety deposit bow from the time of the execution of the same in 1595 until the time of the brief, it ough the delivere the other THE of bonness, that is also soon of the basiness of its consequent she did now active to its a complete of the in the same of an annual one, it maports to give subject of the design and the year is so of the iso in the calculation. Three is the water That Clivia F. soldenius, to the the one of as introduct, tolk corp. Lion of the set of a lie throness in the ventile also similar month subjective the promise in partial partial action, and animal soften talining for modelices we should be sent with the would not have for his other property if the had and not beare was a locae upbn it. If the alleged leade was not a wasulent Will fam of your coll degree a dgree gound inc all the wife, sono as it not turn deeper to ditvi. Didented a shen har had ad-Dr. .olderhaust, live and she secure the owner of the property? All of the evidence offered by plaintist that tended to support her claim that the lease was a frandulent one is comp tent, and should have been admitted. To some of the reidence offered the court ruled that a proper foundation had not bean left for the ovidence. We take it that the court was of the opinion that nadactions of the same to be first but of anytacher before the offered evidence would be competent. The rule that the trial court had in mind does not apply to the parties to a suit. The offered evidence was competent against Kenwischer,

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defendant, as in the nature of admissions against interest.

However, in view of the conclusion that we have reached upon
the first point raised by plaintiff, it is unnecessary for us
to decide the question as to whether there is sufficient
evidence in the record to warrant a finding that the lease
is a fraudulent one, although we feel impelled to state that
it is subject to grave suspicion. Defendants offered no legal
defense to plaintiff's action and the judgment of the Circuit
court of Cook county is reversed and the cause is remanded
with directions to enter a judgment in favor of plaintiff.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

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Friend, P. J., and williven, J., concur,

43336

WILLIAM T. DICKERMAN, Appellee,

٧.

AMY V. JONES,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT

This action was brought by plaintiff. William T. Dickerman, before a justice of the peace on October 22. 1943 to recover for legal services rendered by him to defendant, Amy V. Jones, in a divorce proceeding wherein a decree was entered in her favor on May 12, 1932. The justice of the peace entered judgment in favor of Attorney Dickerman and against Amy V. Jones for \$329.75. Defendant appealed from said judgment and on October 25, 1944, after a trial de novo before the court without a jury, the circuit court also entered judgment for \$329.75 in favor of plaintiff and against defendant, from which judgment defendant prosecutes this appeal.

The evidence in the record consists solely of the undisputed and unimpeached testimony of Attorney Dickerman and numerous documents introduced by him. Amy V. Jones did not testify nor was any evidence offered in her behalf in the instant case.

In September, 1931 Amy V. Jones engaged Attorney Dickerman to prosecute her suit for divorce against her husband, Dr. Horry M. Jones. She said to Dickerman that she had no money to pay him attorney's fees at that time. He told her, "You know the courts never allow a lawyer a reasonable fee in these divorce suits, and I don't take them unless I can see my way to get paid for my time \* \* \* I want you to sign the necessary papers, to make up a

ILLIAM I. . . CACHNA.,

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. LAY V. JOHES,

WALLE LOW STROUTE COUNTY,

13. JUNEAU EUR FYAR DAMIN AME MIT. CITTLE OF THE FORM.

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This action was brought by plaintiff, thisne T. Dickernan, browe a justice of the pease on tatober 2m, 194] to recover the legal acression waters or trained by ide to defendant, Amy V. Jones, in a divorce proceeding wherein a decree was ont red in her favor on tay 11, 1932. The justice of the peace americal judgment in the or the peace of the legal to tay was a fathern to the peace americal judgment in the peace of the legal to the form the legal of the legal to the form the legal of the legal to the form the legal of t

the evidence in the page, consists cleir of the undisputed and uningenied bustinent of Accorney sickersum and numerous coursets introduced by ide. Any V. Jones did not tabbilly nor was any evidence of the introduced on the instant of the instant

 reasonable fee for what the Court does not grant me." She agreed to his proposition. The divorce case was contested, numerous hearings were had before a master and a decree was entered on May 12, 1932 granting Amy V. Jones a divorce and the custody of her two children. The decree directed that Dr. Jones pay Amy V. Jones \$25 per week for the support of herself and the two children and it also directed that he pay her \$1100 at the rate of \$25 per month commencing August 1, 1933, \$200 at the rate of \$25 per month commencing November 1, 1932 for necessary surgical and hospital expenses theretofore incurred by her and \$175 additional solicitor's fees at the rate of \$25 per month.

As the result of negotiations between Attorney Dickerman and Amy V. Jones after the entry of the decree efdivorce they agreed that \$500 was a reasonable fee for his services in prosecuting her divorce action to decree. The terms of this agreement were incorporated in the following instrument executed by Amy V. Jones on July 5, 1932:

"STATE OF ILLINOIS ) SS.

IN THE CIRCUIT COURT OF COOK COUNTY

Amy V. Jones

VS.

No. B228665

Horry M. Jones

Whereas, the undersigned, complainant in the above entitled cause, retained W. T. Dickerman, 9206 Commercial Avenue, Chicago, Illinois, as her attorney to file a bill for divorce and for other relief, which bill was filed in the above entitled cause and prosecuted to a decree, which was entered May 12, 1932; and,

Whereas, the said W. T. Dickerman is entitled to receive a reasonable fee for services rendered up to the time of having said decree entered on May 12, 1932, and a reasonable fee for the services rendered by said W. T. Dickerman to the undersigned up to and including the entry of the decree on May 12, 1932, is the sum of Five Hundred (\$500.00) Dollars, and the undersigned is without means to pay the balance due said W. T. Dickerman; and,

reasonable fee for what the Court does not grant me." The agreed to his proposition. The divorce care was contested, numerous hearings were had before a .....r. and a decree was entered on May 10, 1930 granting May V. Jones a divorce and the custody of her two children. The decree directed that Dr. Jones pay Amy V. Jones (25 per week for the support of ed tent esteeth esta ti ben der lide ovt ent has fleered pay her (1100 at the acte of 125 per month com encing formed 1, 1913, \$200 at vie rete of Aff per month commercing Hovember 1, 1931 for necessary surgical and hospital expenses theretefore incurred by her and AFF additional solicitor's fees at the rate of (25 per manti.

As the result of negotiations between Attorney Biehermen and kny V. Jones . The other of the . Jones of they they agreed that "You use a reasonable for for his services in prospenting her civorer; ation to decree, The terms of this agreement were incorporated in the following instrument exeented by Jay V. Jores on July J. 1932:

"STATE OF ELITABLE | SEA.

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iny V. Jones

Ho. B223665

Horry M. Jones

VSV

Whereas, the undersigned, complainent in the above entitled eruse, retained ". I. Pickernan, 9206 Cow ereish avenue, Chicago, Hliinois, ha her atterney to file a bill for diverce and for other roller, which bill was filed in the above entitled cause and prosecuted to a decree, which was entered May 12, 1932; and,

Whereas, the said V. T. Dickerman is entitled to receive a reasonable fee for services rendered up to the time of having said decree entered on May 12, 1932, and a reasonable fee for the services randered by said W. T. Dickermen to the undersigned up to and including the entry of the decree on May 12, 1932, is the sum of Five Hundred (\$500.00) Dollars, and the undersigned is without means to pay the balance due said W. T. Dickerman; and, Whereas, by reason of an order entered in the above entitled cause on October 2, 1931, the defendant, Horry M. Jones paid to W. T. Dickerman the sum of Seventy-five \$75.00 Dollars on account of attorney's fees for the undersigned, and the decree entered in the above entitled cause on May 12, 1932, provides that said Horry M. Jones shall pay to the undersigned the further sum of One Hundred and Seventy-five (\$175.00) Dollars as additional solicitor's fees payable \$25.00 in 30 days and \$25.00 every 30 days thereafter and the whole sum of said \$175.00 to be paid within seven months from the entry of said decree; and,

Whereas, the undersigned desires to secure the payment of the further sum of Two Hundred and Fifty (\$250.00) Dollars to said W. T. Dickerman, and not having the present means to pay the same;

Therefore, in consideration of the premises, and the services rendered by said W. T. Dickerman, I do hereby sell, assign, transfer and set over to W. T. Dickerman, his heirs, executors, administrators, and assigns, all my right, title and interest in and to the sum of Two Mundred and Fifty (\$250.00) Dollars payable to me as provided in said decree entered May 12, 1932, in the above entitled cause, out of the \$200.00 expenses incurred on my behalf for surgical and hospital treatment and care and out of the sum of \$1,100.00 directed to be paid to me in cash by the defendant, Horry M. Jones, and more fully set forth on pages 7 and 8 of said decree; and I further direct and order that the defendant, Horry M. Jones, to pay direct to W. T. Dickerman the \$175.00 additional attorney's fees provided for in said decree, and upon the said W. T. Dickerman receiving from the said Horry M. Jones the said sum of \$250.00 and \$175.00, all other sums payable under said decree shall be paid direct to me, and no part of the alimony allowed in said decree shall be used to pay the attorney's fees herein provided for.

Said W. T. Dickerman, his heirs, executors, administrators or assigns, are hereby authorized and empowered to take all legal measures which may be proper or necessary for the complete recovery of the money hereby assigned."

It will be noted that in this instrument Amy V. Jones not only made an assignment to Attorney Dickerman of \$250 of the monies payable to her by Dr. Jones under the terms of her decree of divorce but that she acknowledged her indebtedness to Dickerman in that amount as the balance due him for his services up to and including the date of the entry of said decree.

On the same day that Amy V. Jones executed the foregoing instrument she again retained Attorney Dickerman to defend her decree of divorce on an appeal therefrom by Dr. Intras, it weren of an order entered in the above envised of ease on October 1, 1951, the ladendard, start of one paid to a correct of a case of evency-five 197,00 pailing on the same the same of evency-five intaged, and the case interval at the above militial cause on far 18, 1972, rotice into a decreasing the the same of the party of the same of end feventy for the same of the payeble of the case of the payeble of the same of the same of the payeble of the same of the same of the payeble of the same of

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It will be not I that in this instrument iff V. Jones not only made in as invent to Attorner Eiskerman of . 50 of the nomice pays bla to for by dr. Jones under the terms of her access of theorem but the terms of her to the canonical at the interledness to rich rule in that occurs as the balance due him for his services up to and including the date of the inter of said decree.

On the same day that Amy V. Jones enscuted the foregoing instrument she again retained Attorney Dickerman to defend her decree of divorce on an appeal therefrom by Dr. Jones. He procured the dismissal of the appeal and shortly thereafter, in December, 1932, Dr. Jones was ordered committed to the county jail on Mrs. Jones' motion because of his refusal to pay past due alimony and the attorney's fees allowed her to defend against the appeal. Mrs. Jones then told the court that "she didn't want the doctor sent to jail" and the motion to commit was continued until March 10, 1933 upon the promise of Dr. Jones that he would try to raise the money and make some payments.

On March 8, 1933 Mrs. Jones wrote a letter to Attorney Dickerman which reads in part as follows:
"Dear Mr. Dickerman:-

This is to notify you that from this time on your services are no longer needed in connection with my case. You are not to represent me March 10th as my atterney.

Dr. Jones will pay you your fee as he gets the money to pay you, and I shall see to it that action is taken immediately to prevent you from continuously bring us into court, and threatening Dr. Jones with a jail sentence because of your fee.

You will have to content yourself with the amount Dr. Jones is able to pay you each month until your fee is paid."

After receiving the foregoing letter from Mrs. Jones, Dickerman served a notice on Dr. Jones, dated March 10, 1933, of the assignment made to him by Mrs. Jones on July 5, 1932. He testified that "at that time there was a depression and business was so bad I did not do anything further about collecting the money on this assignment."

On October 31, 1933 Mrs. Jones paid Attorney Dickerman \$30.50, for which he gave her a written receipt which recited that such payment was made "in reduction of \$250.00 assignment on decree."

Several years thereafter Attorney Dickerman brought suit against Dr. Jones on the assignment and according to

Jones. se proserved the ubushband of the appeal and shortly thereafter, in sevember, 1933, Dr. Jones was ordered committed to the county juil on the. Jones' motion because of his refusal to pay pust due although and the attorney's Jees allowed her to defend against the appeal. Mrs. Jones then cold the sourt that "sie alin't want the doctor sent to juil' and the motion to count was soutined until jarch 10, 1933 upon the promise of Dr. Jones that he would try to reice the money and make some payments.

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Saveral years thoroafter Attorney Dickerman brought suit against Dr. Jones on the assignment and according to

Bickerman, Dr. Jones testified on October 22, 1943 in that proceeding that "before he received the notice of assignment on March 10, 1933, he had settled with Mrs. Jones and paid her cash, and paid out cash for her in full settlement of the \$200 and the \$1,100 which the decree required him to pay Amy Jones" and that Amy V. Jones testified that "she received from Dr. Jones after July 5, 1932, and before March 10, 1933, cash money paid out for her benefit, which satisfied in full the \$200 and the \$1,100 out of which she assigned me [Dickerman] \$250." Judgment was entered in favor of Dr. Jones in that case on the ground that he had paid Amy V. Jones all the money due her under the decree before the notice of the assignment was served upon him. His claim on the assignment against Dr. Jones having been defeated by the receipt by Amy V. Jones from her former husband of the \$250 which she had theretofore assigned to him, Attorney Dickerman brought the instant action in contract on October 22, 1943 against Amy V. Jones for the balance of fees claimed to be due him for his legal services in prosecuting her suit for divorce to a decree.

Defendant contends that plaintiff's claim is barred by the statute of limitations. That of course would be true if plaintiff brought this action on his original oral contract of employment. The oral contract, however, anticipated that the parties would later enter into a written contract which could only be done under the terms of said oral contract after the decree was entered in the divorce case. Not until then could the parties have known what solicitor's fees would be allowed Mrs. Jones by the trial court or the extent and reasonable value of the services rendered by Dickerman.

Plaintiff's position is that his cause of action accrued on July 5, 1932, when Amy V. Jones in the instrument heretofore

Lickerman, Pr. Jones Castified on Jetobor 28, 1945 in that proceeding that "before he received the notice of continuent on arch 10, 1313, he had sattled with i'vs. Jones onl paid hor caun, and pade one cash for her in full softlement of the GRCC and the pl. 110 which the doores required him to pay any Jones" and that say I. . once testified that she red iven from ir. Jones after all follows all before land las 19 g cash money ". Jan. [marmetch:] on bergin. . ale Holle to tro M.I.I; off dedicate was entered in favor of Dr. Jones in that a con the ground of the had paid now W. Jones all the money due her under the comes before the novice of the a character was cerved upon him. Als biblin on the wall meant accimat Dr. Cones having been defeated by the receipt by day louis from the former ented of from their around their relation of the out to be absented by Attorney Diskerman brought the dark no cotion in contract on Gotober 22, 1945 against day T. Jones for the belance of fees chained to be and its for the logal struces in prosecuting nor sait for divorce to a decree.

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Flaintiff's position is that his esuse of cetien secrued on July 5, 1932, when Amy V, Jones in the instrument heretofore

set forth acknowledged her obligation to pay him the balance of \$250 due on his fees, that since she admittedly made a payment to him of \$30.50 on October 31, 1933 to apply on such balance, he had a right to bring this action within ten years after the date of such payment, that he filed this suit on October 22, 1943, which was less than ten years after Mrs. Jones made said payment of \$30.50 to him on October 31, 1933 and that therefore section 16 of the Limitations Act (par. 17, chap. 83, Ill. Rev. Stat. 1943) is applicable to the situation presented here. This section provides in part as follows:

"Actions on \*\*\* written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued; but if any payment \*\*\* shall have been made \*\*\* on any contract, or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment."

It is conceded that Mrs. Jones' assignment to Attorney Dickerman did not extinguish her obligation to pay him the balance due on his fees. However, she insists that "her obligation to pay plaintiff was not in writing and was therefore governed by the five-year statute of limitations and became barred by the statute five \*\*\* years after October 31, 1933. the date on which the last payment was made by Mrs. Jones." In our opinion the instrument executed by Mrs. Jones on July 5. 1932 was more than an assignment. It recited her employment of Dickerman as her attorney to represent her in the divorce proceeding which he prosecuted to a decree and that he was entitled to receive a reasonable fee for the services rendered by him up to the time the decree was entered, such reaconable fee being \$500. The instrument served a two-fold purpose. It recognized and evidenced the obligation of defendant to pay plaintiff the balance due on his fees and then to secure the payment of such balance proceeded to assign to Attorney Dickerman a portion of

set forth for ourse, of a coligation to pry the balance of algo due on his fees, that believe all admittally made a rapped to mid of ago, occoping the admittally made or balance, he had a right occiping this action althin ten years after the acro of such payment, that is fill this suit on occoper if, 1945, which was dess than ten years ofter mis. 1945, which was dess than ten years ofter mrs. Jones and out of agreement of algorithm to of all the distinctions action to of the distinctions action provides in part as follows:

Inctions on whithen controcts, or other evidences of incobedness in uniting, thin he continued itim ten years not; from the course of acts an accreed; but if any pryment first small navo can make if any or other or other triffen ovidence of incohe and within or after the said period of ten years, then an ection and control of or new times in our time.

It is convoied that Firs, Jones' and gueent to Attorney of shorten and not orthogolate the obligation to pay him the alance due on his tess. Morever, als insists that "her obligrologed saw has guiting at Jon was Thidalal, yes or moids; governed by the Hive-year stauta of hightstions and become barred by the statute five the years after atoher 31, 1933, the date on which the last payment was made by Mrs. Jones." In our opinion the instrument executed by are. Jones on July 5, 1932 was more then an analyment. It restead her some any Midderman as her attorney to represent her in the divorce prodeeding which he prosecuted to a decree and that he was entitled to receive a reusonable fee for the services rendered by him up to the time the decree was entered, such reasonable fee being \$500. The instrument served a two-fold purpose. It recognised end evidenced the obligation of defendant to pay plaintiff the balance due on his fees and then to secure the payment of such belance proceeded to assign to Attorney Dickerman a portion of the monies which the decree directed Dr. Jones to pay her. We think that the aforesaid instrument, in addition to including an assignment therein, was "an evidence of indebtedness in writing" within the purview of section 16 of the Limitations Act.

Defendant asserts that a confidential relationship existed between her and plaintiff and that Atterney Dickerman failed to prove that the assignment was not influenced by such relationship. There is not the slightest merit in this contention and it is raised for the first time in this court. It can hardly be advanced seriously because it is completely answered by one of the cases cited by defendant herself, Elmore v. Johnson, 143 Ill. 513, wherein the court said at p. 525:

"Before the attorney undertakes the business of the client, he may contract with reference to his services, because no confidential relation then exists and the parties deal with each other at arm's length. The same is true in regard to dealings which take place after the relation has been dissolved, (1 Story's Eq. Jur. - 13 ed. - secs. 310 to 313)."

It is uncontroverted that the original agreement between the parties was that Dickerman was to prosecute Mrs. Jones' divorce action to a decree and it is also uncontroverted that he did not represent her after the decree was entered on May 12, 1932, until she again employed him to defend her decree against Dr. Jones' appeal. In so far as the fees involved herein are concerned, the relation of attorney and client did not exist between the parties when Mrs. Jones obligated herself in writing to pay them.

Prior to the time plaintiff instituted this action he had received toward the payment of his \$500 fee \$75 as temporary solicitor's fees, \$175 allowed under the decree as additional solicitor's fees and the \$30.50 paid him by Mrs. Jones on October 31, 1933. These items aggregated \$280.50 and left a

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It is uncontrol that the original term ment between the parties with the also uncontrol attential distribution of atter the description of the also uncontrol of the site of attential and again exployed the to found her correct against Dr. Jones' appeal. In so fer as the free involved herein are concerned, the relation of the chart and aid to the other not exist between the partie, when the other olders of the other when the partie. Then then the partie, when the partie is then.

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balance due on his \$500 fee of \$219.50. The judgment entered by the trial court for \$329.75 included said balance of \$219.50 and interest thereon.

We are impelled to hold that this judgment was properly entered by the Circuit court of Cook county and it will therefore be affirmed.

JUDGMENT AVFIRMED.

Friend, P. J., and Scanlan, J., concur.

bulance due on his \$500 fee of \$219.50. The judgment entered by the trial court for \$389.75 imeluded taid belince of \$119.50 and interest thereon.

We are impelled to hold that this judgment was properly entered by the Streut's court of Cook sounty and it will therefore be officeed.

JUDGISHWY KUMBINGUT

Friend, P. J., and Scanlam, J., conver.

43464

CATHERINE M. JACOBSON,
Appellee.

V.

CHICAGO MOTOR COACH COMPANY, a corporation,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal, defendant, Chicago Motor Coach Company, seeks to reverse a judgment for \$1,000 entered on the verdict of a jury in favor of plaintiff, Catherine M. Jacobson, in an action to recover damages for personal injuries alleged to have been sustained by her as the result of the negligent operation of a bus owned by defendant.

Defendant's theory is that its chauffeur was operating a double deck bus in a northerly direction on Sheridan road and had stopped to discharge and pick up passengers at or approximately at one of its regular bus stops on the east side of Sheridan road and north of the north crosswalk of Pratt boulevard; that while the bus was so stopped the automobile in which plaintiff was riding was negligently driven into the rear end of the bus; and that it was not guilty of any negligence which proximately contributed to cause the accident.

Plaintiff's theory of fact as stated in her brief is that she was a guest passenger in the front seat of an automobile "which was being driven northward at a reasonable speed near the center line of Sheridan road, a heavily travelled six lane boulevard, that when the car in which she was riding was but a short distance away the bus of the defendant, which had been stopped at the curb on the northeast corner of Sheridan road and Pratt boulevard, pulled out

43464

CATHERING M. JACCBSON, Appeller,

. 77

CHICAGO MOTOR COACH COMPANY, a corporation, appellent,

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Plaintiff's theory or fact as stated in her brief is that she was a guest passenger in the front seat of an automobile "which was being driven northward at a reasonable speed near the center line of Sheridan road, a heavily travelled six lane boulevard, that when the car in which she was riding was but a short distance away the bus of the defendant, which had been stopped at the curb on the northeast corner of Sheridan road and Fratt boulevard, pulled out

suddenly into the lane of the private car to go around cars parked ahead in front of the Rogers Park Hotel, then stopped again suddenly to let off another passenger when 15 or 20 feet in front of the private car, that the driver of the private car applied his brakes but the distance was too short and he could not turn out to his left because of heavy southbound traffic."

The accident occurred on Sheridan road north of Pratt boulevard on April 15, 1942 shortly after 12:30 A.M. At that point Sheridan road runs due north and south and Pratt boulevard runs east and west. Sheridan road is a wide, heavily travelled boulevard with three lanes on the east half of the street for northbound traffic and three lanes on the west half of the street for southbound traffic. The weather was clear, the streets were dry and Sheridan road was well lighted.

Plaintiff testified on direct examination that on the occasion in question she was riding north on Sheridan road on the front seat of an automobile which was owned and being driven by one Edward Hartwell: that he was driving "close to the center line" or "toward the middle of the street": that just as he reached Pratt boulevard Hartwell was driving at a speed of about 20 or 25 miles per hour; that when she first saw the bus, it was "in front of us, and it pulled in to the curb to let off passengers, and there was double parking there, and he pulled quickly around the cars parked and then out in the center lane and then stopped and let more passengers off"; that when the bus pulled out to go into the traffic lane in which Hartwell was driving, his car was about 15 or 20 feet behind it; that after the bus pulled out from the curb "it stopped again and some more passengers got off, and that is when we hit it": that "there was heavy southbound traffic" in

ouddenly into the lame of the private can to go around cans parked ahead in front of the begans main lovel, then stopped again suddenly to let off another passinger when if or 20 feet in front of the private car, that the driver of the private car applied his brakes but the distance was too short and he could not turn out to his left because of heavy could not turn out to his left because of heavy

The mosthest oscarred on deriden road north of Fratt boulevard on April 19, 1942 shortly after 10:30 A.M. At that point Cheridan road runs due north and south and Fratt bouleward runs east and west. Northan road is a wide, heavily travelled boulevard with three lanes on the east half of the street for northbound traffic and three lanes on the west half of the street for northbound traffic and three lanes on the west clear, the street for southbount traffic. The verther was clear, the streets were dry and theridan road was well tighted.

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The following occurred on plaintiff's cross-examination:

"Q. Well, now, where was your automobile when you first observed this bus? Do you recall that? A. Well, I remember it as it crossed Pratt. Q. Is that the first time that you saw the bus? A. No, I suppose I saw it before, but I don't remember definitely. Q. But you do recall it as it was crossing Pratt Boulevard? A. Yes. Mr. Graham [plaintiff's attorney]: She said as her car was crossing Pratt Boulevard, as I understand.

MR. Glick: [defendant's attorney]: Q. What is your answer? Did you observe the bus as the bus was crossing Pratt Boulevard? A. No, we were crossing Pratt Boulevard."

Hartwell's car was crossing Pratt boulevard it was in the middle lane "near the white line"; that at that time she saw the bus "at the [northeast] curb \*\*\* in front of the Rogers Park Hotel"; that "it was standing still, because the passengers were getting off"; that the bus "stopped before we crossed Pratt Boulevard"; that when Hartwell's car was crossing Pratt boulevard "the bus was on the east side of Pratt"; that she could not say definitely that she saw the bus as Hartwell's car was crossing Pratt boulevard, "because all I remember is the bus being there and pulling out and going around these cars"; that when she first saw the bus "naturally, it was on the east curb" of Sheridan road. Then the following questions were asked her and she

the west lady of sheridan road; what when one limit on the bus, Hartwell "put on the brakes" in that liter he put on the brakes, "we struck the base; an thick from the time he put on the brakes antil his our others the bus, "I only know that the bus pulled out and then rtopical dead, and then after that I con't have has pulled out and then rtopical dead, and then after that I con't have had been aned."

The following obvious on phaintiff's erectors with the set of the coll, no., there was your microfile when you like offserved this has? Do you recall that? A. Coll, I remember it as it crossed Prott. O. I. that the first that the wast you saw the bus? A. No, I suppose I a with before, but a set o require the bus? A. No, I suppose I a with before, but a set o require redeficitively. .. The your observed? ... The your observed? ... The prott Doubern, and I understand.

In. Chick: [defendant's atterney]: A. h.t is your answery hid you occorve the bus as the bus was erocain or the doubernance?...

She tasified further on specializable unit as sartwell's our was profit bonlay was it was in the side land 'Assamble Land'; that of the land the sat the bus "at the landtheast ours we in history of the Pogers rank sotal"; that "it was standing still, because the pogers were getting of the the the bus "stopped the passengers were getting of "; that the bus "stopped before we crosed "with soulevard"; the telen hartwell's car is crossing for the book var and the east side of Pratt"; that she sould not say definitely that she saw the bus as Hartwell's err was crossing for the onlevare, "because all I remember is the bus being there and pulling out and going around these cars"; that when she first saw the bus "naturally, it was on the east curb" of Cheridan read. Then the following questions were asked her and she

made the answers as indicated: "Q. And at that time was it moving or standing still? A. It was idling and it pulled out. Q. Well, was it in motion when you first saw it? A. Yes, naturally, when it come out in front of me. Q. At that time where were you? A. We were crossing Pratt. Q. How far from the bus were you at that time? A. About 20 or 30 feet. Q. Was the bus moving directly north when you saw it? A. Yes \*\*\* and it seemed that it was going right on ahead."

She also testified that as she "saw the bus moving directly north, " Hartwell's car was "about 20 or 30 feet" from the rear of the bus and that he was driving at a speed of "about 20 or 25" miles an hour; that as the bus pulled out from the curb it "started fast, he pulled out and around quite fast, but I don't know what rate of speed it was"; that as the bus was going north to go around the cars that were double parked at the east curb it was moving faster than Hartwell's car; that Hartwell's car was "right in back" of the bus when it collided with the rear end of it; that whether she saw that the bus was lighted or whether Hartwell's car struck the bus directly in the rear "didn't come into it \*\*\* I mean that it had no bearing on it, because if we had gone around the bus, which was the only alternative, we would hit the cars going south"; that she did not know that Hartwell's car was going to run into the rear end of the bus; that "we had collided with the bus" when it stopped the second time and "I believe one woman was alighting from the bus \*\*\* was thrown \*\*\* he was letting out more passengers": that when the bus stopped suddenly Hartwell's car was "about 20 feet from the rear end of it": that she did not know whether Hartwell's car was 20 feet from the rear end of the bus when it stopped; that "when it stopped we collided, but previous to that when it pulled out we were a good 20 or 30 feet behind it"; and that when the bus pulled

made the enemers as indicated: "Q. and at that time was it moving or at ading still? A. It are idling and it publies out.
Q. dell, who it is notion when you him to an able. "A. Yes, naturally, when it come out is from the se. ". "E that time where were your A. "O were creating are th. "Low for from the bas some your at that time? ". Though a bout at our first time? ". Though an first time? ". Though an about 10 or 30 feet. "." The bas noving directly merth onen you are it? "." Yes seet and it seemed that it was going right on chood."

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out and stopped Hartwell's car "wasn't moving fast \*\*\* it was going about 20 or 25, I would say \*\*\* I didn't look at the speedometer."

We have set forth the testimony of plaintiff practically in its entirety for the purpose of showing how vague, indefinite and evasive she was in relating her version as to how and where the accident happened.

Edward Hartwell, the driver of the automobile in which plaintiff was riding, was in the Army in France at the time of the trial and was therefore not available as a witness.

Six witnesses testified in defendant's behalf Katia Vasseur, Samuel Swerinsky, Ada House, Irving Glasky,
Alice Momsen and Judith Bearfield.

Katia Vasseur, who was employed by the United States
Treasury Department, testified that she was a passenger on
the bus; that there was a regular bus stop on the east side
of Sheridan road north of the north crosswalk of Pratt
boulevard; that defendant's bus stopped a few feet away
from the curb on the east side of Sheridan road; that while
it was stopped there "for people to get off" she heard a
"bump" in back of the bus; that she did not remember whether
there were cars parked between the bus and the curb when it
stopped; and that it stopped in such a position that it
could proceed north without "swinging out."

Samuel Swerinsky testified that he was a police officer of the City of Chicago; that he was off duty at the time and was in a drug store at the northeast corner of Sheridan road and Pratt boulevard; that he did not see the accident but heard the "crash"; that he went right out to the scene of the accident and saw a bus "standing" there discharging some passengers on the northeast corner; that the east side of

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end was a few feet north of the north crosswalk of Pratt boulevard; that the bus was facing directly north; that the front end of an automobile, which was "all smashed up", was then about a foot or a foot and one-half south of the rear end of the bus; that he inspected the stop lights on each side of the rear end of the bus and found that they were in proper working order; and that there was no car parked between the curb and the bus where the latter was stopped but that there were cars parked "north of that."

Ada House testified that she was a housewife and that she was a passenger on the bus; that the bus stopped at its usual stopping place; that it was facing directly north when it stopped; that while passengers were being unloaded there was a "severe crash from the rear that threw her against the seat in front"; that at the time of the crash the bus was standing still about 4 or 5 feet from the east curb; and that she did not recall any cars parked between the bus and the curb.

Irving Glasky testified by deposition that he was the chauffeur of the bus; that there were cars parked along the east curb of Sheridan road north of Pratt boulevard; that he stopped the bus at the regular stopping place 5 or 10 feet north of Pratt boulevard; that he was double parked due to the fact that there were cars parked along the east curb; that he stopped the bus about 2 feet west of such parked cars so that he could discharge passengers; that the east side of the bus was about 8 or 10 feet from the east curb; that just as he was about to open the front door he heard the impact at the end of the coach; that he got out and walked back and saw a car up against the rear end of the coach with its front end down on the

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street; that the front end of the car was demolished; that his bus was stopped in the second lane of traffic from the east curb and the left side of his bus was about 6 or 8 feet from the "center of the road"; and that he stopped a few seconds before the impact and that all his tail lights and stop lights were "okay."

Alice Momsen testified that she was employed at the United States post office; that she was a passenger in the bus and was sitting in the front seat thereof intending to alight when it stopped at Pratt boulevard; that the bus stopped at Pratt boulevard on the north side of the street; that when it came to a stop it was about the width of a car from the east curb; that there were cars parked along the east curb of Sheridan road a little bit north of where the bus stopped; that the driver opened the front door of the bus and when he did so she put one foot down on the step; that she then heard a crash and turned to see what happened; that she got out of the bus and saw the automobile which hit it; that the car was directly behind the bus; that at the time it was struck the rear end of the bus was almost the length of an automobile north of the north crosswalk of Pratt boulevard facing directly north: that prior to the accident the bus made only one stop on Sheridan road north of Pratt boulevard; and that she was injured by the closing of the door of the bus on her shoulder while she was in the act of alighting therefrom.

Judith Bearfield testified that she was a nurse at St.

Luke's Hospital; that she was a passenger on the bus; that it stopped on the north side of Pratt boulevard facing directly north and not far from the east curb of Sheridan road; that she did not know the actual distance the bus was from the east curb of Sheridan road; that while the bus was standing still

street; that the front end of the ear was demoliched; that his bus was stopped in the second line of traffic from the cast curb and the last side of his has was about 5 or 3 feet from the "center of the road"; and that he stopped a few a conds before the impact and that all his tril lights and stop

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"all of a sudden there was a terrific jar \*\*\* that came from the rear end of the bus"; that she alighted from the bus and saw the car that had "bumped into the back" of it; that the rear end of the bus was north of the north crosswalk of Pratt boulevard; that to the best of her knowledge the back of the bus "was about an extra large step from the curb"; that the front end of the bus was a little farther from the curb than the rear end; and that after the crash all the passengers wandered to the front end of the bus and got out.

Plaintiff testified in rebuttal by way of impeachment of Alice Momsen, one of defendant's witnesses, that when she was being taken to the hospital in the squad car and while she was in the hospital immediately after the accident occurred, Alice Momsen was with her and that Alice Momsen told her both in the squad car and in the hospital that "when the bus reached Pratt boulevard it stopped at the regular stop and let off several passengers \*\*\* and that after letting out several passengers he pulled out and at her [Alice Momsen's] insistence he stopped suddenly by throwing the brakes suddenly and opening the door."

Alice Momsen denied that she made the foregoing statements attributed to her by plaintiff.

The defendant urges other points for reversal predicated on the asserted failure of plaintiff to prove her cause of action but we only deem it necessary to consider defendant's contention that "the verdict and judgment are contrary to the manifest weight of the evidence."

Every witness in this case, including plaintiff, testified that the bus stopped at or approximately at the regular bus stop at the northeast corner of Sheridan road and Pratt boulevard. Every witness, including plaintiff, testified that when the bus stopped its rear end was a short distance north The rear that of the first constitutions are this to the the first and the rear that of the first constitution and the rear that of the first thing of the other the structure of the first constitution of the first of the first constitution of the first of the first constitution of the first constitution of the first constitution of the constitu

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of the north crosswalk of Pratt boulevard. Defendant's witnesses testified variously that the rear end of the bus was from a few feet to about 10 feet or the length of an automobile north of the north crosswalk of Pratt boulevard when it stopped. Plaintiff testified that the bus "pulled in to the [east] curb to let off passengers." Defendant's six witnesses testified variously that when the bus stopped to discharge passengers, its east side was from about 2 feet to 10 feet from the east curb of Sheridan road. According to plaintiff the bus stopped at the east curb of Sheridan road with double parked automobiles ahead of it, let off some passengers, hurriedly pulled around the double parked cars until it was headed directly north in the third lane of traffic west of the east curb, then suddenly stopped again and some more passengers got off and that "is when we hit it." Also according to plaintiff's testimony and her theory of fact, as stated in her brief, Hartwell was driving close to the "center line" of Sheridan road when his car ran into the rear end of the bus. Plaintiff did not testify directly as to just where in Sheridan road the bus and Hartwell's car were after the accident but if, as she states, the bus had pulled around the cars that were doubled parked at the east curb and had reached a position near the "center line" of Sheridan road headed directly north when it was struck, its rear end at that time must have been considerably more than a bus length north of the north crosswalk of Pratt boulevard and even a greater distance northwest of the point at the east curb where she said she saw the bus "standing still."

Plaintiff's testimony as to the manner in which the accident happened and the point where it occurred is not corroborated by a single witness or by any fact or circumstance

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Flaintiff's testimony as to the manner in which the accident happened and the point where it occurred is not corroborated by a single witness or by any fact or circumstance

in evidence. Not only is her testimony inherently improbable but it is contradicted by six witnesses, five of whom were wholly disinterested. Since these/witnesses testified that the bus was standing still from 2 to 10 feet north of the north crosswalk of Pratt boulevard at or approximately at the regular bus stop on the east side of Sheridan road when Hartwell's car smashed into the rear end of it, the conclusion is inevitable that the accident did not happen and could not have happened in the manner plaintiff testified that it did. Inasmuch as the evidence clearly shows that defendant's large, well lighted bus was where it had a right to be on Sheridan road when it stopped to discharge passengers and inasmuch as Hartwell's view to the north was unobstructed as his car approached and reached Pratt boulevard from the south, we think that his "smashing" into the rear end of the standing bus can only be attributed to his negligent failure to keep a proper lookout.

We are impelled to hold that the verdict was against the manifest weight of the evidence.

We had occasion in the recent case of McCormack v. Chicago Surface Lines, 327 Ill. App. 208 (abst.) to consider a factual situation in a personal injury case where the uncorroborated testimony of the plaintiff was contradicted by six witnesses, three of whom were disinterested. In that case we said:

"We are firm believers in the jury system and are in full accord with the rule stated by the Supreme court in People v. Hanisch, 361 Ill. 465, 468, that 'The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury.' We are satisfied, however, after a careful analysis of the evidence, that the verdict of the jury in the instant case cannot be sustained. In weighing the evidence we were bound to consider plaintiff's uncorroborated testimony as to the manner in which the accident occurred in the light of his personal interest in the suit."

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(abst.) the court said:

"This is not a case where the uncorroborated testimony of the plaintiff is contradicted by one unimpeached witness only. Plaintiff was flatly contradicted on the essential fact on which he bases his case by five unimpeached witnesses, all of whom were in as good position to know whether the car jerked or swayed as was plaintiff and each of them testified positively that it did not do so. Moreover, four of defendants' witnesses stated positively that plaintiff had stepped from the car and was standing on the pavement momentarily when struck by a passing automobile. Under ordinary circumstances, the number of witnesses alone, testifying for or against an essential fact, do not necessarily determine the weight or preponderance of the evidence, but in this case plaintiff's testimony is so utterly irreconcilable with that related by defendants' witnesses, and so inconsistent with the probabilities of the circumstances shown, as to lend support to defendants' contention that the verdict was against the manifest weight of the evidence."

Having disposed of the principal point urged for reversal, we deem it appropriate for the guidance of counsel, in the event that this case is retried, to consider the question, which arose upon the trial of this case, as to the admissibility of evidence of a settlement made by the defendant with one of its witnesses who was also injured in the accident involved herein.

Defendant contends that "it was highly prejudicial and improper for plaintiff's counsel to show that a settlement was made by the defendant with one of the witnesses."

Plaintiff's position in this regard is that "it was proper to bring out the fact from defendant's witness, Alice Momsen, that she had brought suit and settled with the defendant for injuries claimed in the same accident, not to show an admission of liability on the part of the defendant, but to show such witness's interest and as affecting her credibility."

As has been seen, Alice Momsen, one of the witnesses called by the defendant, was a passenger on the bus involved in the accident. It is asserted in defendant's brief that she made claim and subsequently instituted suit against the

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As has been seen, Alice Monsen, one of the witnesses called by the defendant, was a passenger on the bus involved in the accident. It is asserted in defendant's brief that she made claim and subsequently instituted suit against the

defendant for damages for injuries alleged to have been sustained by her as a result of this accident; that her claim was settled by the defendant before the trial of this case; and that these facts were known to plaintiff's attorney. In the presence of the jury the following occurred during the cross-examination of Alice Momsen by Mr. Graham, plaintiff's attorney:

"Q. And you filed suit against the Bus Company, didn't you? Mr. Glick: That is objected to. The Court: Objection sustained. Mr. Glick: I ask the Court to instruct the jury to disregard it. The Court: The jury are so instructed. \*\*\*
Mr. Graham: Q. You received a settlement from the Chicago
Motor Coach Company, didn't you? Mr. Glick: That is objected to. The Court: Sustain the objection. Mr. Glick: I ask that the jury be instructed. The Court: I will instruct the jury."

On Attorney Graham's insistence that he had the right to inquire into the matter of the settlement made by defendant with Alice Momsen, not for the purpose of showing an admission of liability for the accident on the part of defendant but to show her interest in the outcome of the case and the effect such interest might have upon her credibility, the trial court heard counsel on this question out of the presence of the jury and apparently decided to permit him to interrogate the witness as to whether she filed suit against the defendant but not as to whether she effected a settlement with it. The following occurred when the jury was recalled and the trial resumed:

"Mr. Graham: Miss Momsen, you brought suit against the Chicago Motor Coach Company, did you? The witness: A. Yes, I did. Q. And that suit was pending until two weeks ago?

Mr. Glick: That is objected to. The Court: Sustained."

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Having previously interrogated Alice Momsen as to whether she had received a settlement from defendant, the foregoing question - "And that suit was pending until two weeks ago?" - was undoubtedly asked so that the jury might infer that Alice Momsen's suit was no longer pending because she had received a settlement.

While plaintiff's counsel in his argument to the jury made no direct reference to defendant's settlement with Alice Momsen, there is no question but that in said argument he sought by inference to leave the impression with the jury that such settlement had been made and that if defendant was not responsible for the accident it would not have settled with her. The endeavor of plaintiff's counsel to show by inference both in his examination of the witness and in his argument to the jury that a settlement had been made with her could only have been calculated to prejudice the jury. In our opinion the jury must have been prejudiced by the conduct of plaintiff's attorney in this regard, because we are unable to comprehend how it could otherwise have found the defendant liable under the facts and circumstances shown by the evidence in this case.

Plaintiff cites cases from a few sister states that support her position in respect to the instant contention but these cases are in conflict with the great weight of authority that evidence of settlements is not admissible for any purpose. The general rule is that "a settlement between a party and a third person cannot be shown, even though it relates to the matters involved in the action and the person with whom the compromise was made was in the same position as the party seeking to show such settlement." 31 C. J. S., sec. 292, p. 1055. The only exception to this general rule is where a settlement is made under such unusual circumstances as to warrant its admission in evidence in further-

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Plaintiff sites cross from . Sew sister states that support her position in respect to the instant contention but these cross are in conflict with the great weight of gut crity that evidence of settlements is not simissible for any purpose. The general rule is that "a settlement between a party and a third person cannot be shown, even therein it relates to the antitre involved in the action and the person with whom the compromise was made was in the same position as the party secking to show such settlement." If C. J. S., sec. 292, p. 1055. The only exception to this general rule is where a settlement is made under such unusual circumstances as to warrant its admission in evidence in further-

ance of justice. There was no showing that there were any unusual circumstances in this case in connection with defendant's settlement with Alice Momsen. All the plaintiff sought to show was the fact that said settlement had been made. Alice Momsen was in an entirely different position in relation to the accident than was plaintiff. Alice Momsen was a passenger on the bus. Plaintiff was a passenger in the automobile that ran into the bus.

The principle underlying the rule excluding evidence of a settlement with a third person injured as a result of the same occurrence is stated by Mr. Justice Lamar in a well reasoned opinion in Georgia Ry. & Elec. Co. v. Wallace & Co., 122 Ga. 547, 50 S. E. 478, where is was said at p. 480 of the last mentioned report:

"It costs time, trouble and money to defend even an unfounded claim. Parties have a right to purchase their peace. The fact that they have entered into negotiations to secure that end, admissions or propositions made with a view to a compromise are not admissible in evidence for or against either litigant, in the event there is a failure to adjust and a suit follows. For a much stronger reason, evidence of a settlement with a third person injured in the same casualty ought to be excluded. \*\*\* The rule against allowing evidence of compromise is founded upon recognition of the fact that such testimony is inherently harmful, for the jury will draw conclusions therefrom in spite of anything said by the parties at the time of discussing the compromise, and in spite of anything which may be said by the judge in instructing them as to the weight to be given such evidence."

The question as to the admissibility of evidence as to a settlement made with a third person involved in the same accident was considered in the comparatively recent case of Hill v. Hiles. 309 Ill. App. 321. There the court said at pp. 330-332:

"The question has been fully considered by the courts of highest authority in a number of other jurisdictions and it has been generally held that evidence of settlements made with third parties involved in the same accident is inadmissible. \*\*\* The Illinois courts have consistently refused to permit evidence of mere offers and negotiations for settlement to reach the jury on the ground that public policy favors the settlement of claims outside of court. (Gehm v. People. 87 Ill. App. 158; Edwin S. Hartwell Lumber Co. v. Bork, 138 Ill. App. 506; Graff v. Fox, 204 Ill. App. 598.) We think that this same public policy applies when an actual settlement is

ance of justice. There was no shoring that there were any unusual chrowstances in take case in sommetion with foliase ant's settlement with files lowers. The the plain is sought to show was the fact that and activated how here exert which has been as in an antirely affector resition is whatian to the conident than was plaintief. The light has a passenger on the bus, flaintief, as a same anger in the bus, flaintief, as a same anger in the bus, flaintief, as a same anger in the the bus,

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made with a third party. A person making such a settlement should not be required to explain his conduct before a jury where apart from the mere act of payment there is no other act or statement on his part which could be construed as an admission of liability. If such evidence is not excluded and is allowed to go to the jury it may be extremely prejudicial even where an explanation is made showing that the only purpose of the payment was to avoid litigation without reference to the question of liability."

In <u>Powers v. Wiley</u>, 241 Ky. 645, 44 S. W. (2nd) 591, the court said at p. 592 of the last mentioned report:

"The rule is well settled that, if in the same accident two or more persons are injured, a compromise with one cannot be shown in an action by the other. 22 C. J., p. 320, sec. 354, note B, and cases cited; Ferry's Adm'r v. Louisville Railway Co., 165 Ky. 747, 178 S. W. 1087. The reason for the rule is that the law favors the settlement of controversies out of court, and, if a man could not settle one claim out of court without fear that this would be used in another suit as an admission against him, many settlements would not be made. For this reason, offers of compromise are always held inadmissible, and for the same reason a man's buying his peace from one party can no more be used against him in the suit of another party than the defendant could use the settlement against the plaintiff in the action to reduce his recovery if for only a nominal amount."

We have made an extensive search of authorities in numerous other jurisdictions which support the general rule and we have been unable to find in any of them that any differentiation was made as to the purpose for which the evidence of settlement with a third person injured in the same accident was offered. Regardless of the guise under which such evidence is sought to be presented before a jury, it is "inherently harmful," as was said by Mr. Justice Lamar in Georgia Ry. & Elec. Co. v. Wallace & Co., supra, and it may be extremely prejudicial "in spite of anything which may be said by the judge in instructing them as to the weight to be given such evidence."

Although the trial judge properly sustained objections to the questions asked by plaintiff's attorney in relation to the settlement and directed the jury to disregard them, said attorney accomplished his object by apprising the jury by inference as to the settlement by merely asking the questions. Counsel's made with a third party. A porson maided such a settlement should not be required to explain his unaded before a jury there apart from the . We cot of parters. There is no other act or statement on the part index such with the construct as set admission of liability. If such without to not condition in it salle med to go to the jury it must be often by projection in a sile med to go to the jury it must be often by projection even where at explanation is made already of the coly purpose of the parter whe to the coly alled the parter of the statement of the color statement of the color statement.

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reference to the settlement could not be erased from the minds of the jurors or cured by proper rulings or instructions of the court. Where, as here, counsel suggests facts in questions and in his argument to the jury not proven by the evidence, which are calculated to prejudice the jurors in their consideration of the case, it is the duty of the court for that reason alone to interpose and prevent the success of such methods by setting aside the verdict.

For the reasons stated herein the judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR NEW TRIAL.

Friend, P. J., and Scanlan, J., concur.

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JACOB SIEGEL and LENA SIEGEL, Appellees,

V.

DAVID J. DAVIS and SELMA BLOCH, Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

320 I.A. 132

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiffs, Jacob Siegel and Lena Siegel, to recover from the defendants, David J. Davis and Selma Bloch, possession of the first apartment in the building located at 1508 South Kildare avenue, Chicago, Illinois. After trial without a jury the court entered a judgment order which found that plaintiffs were entitled to the possession of the premises in question and directed that a writ of restitution issue for the removal of the defendants therefrom. Defendants appeal from said judgment order.

Plaintiffs purchased the property involved herein on November 1, 1944. This property was improved with an apartment building, the first apartment in which was occupied by defendants under a written lease for one year which expired on April 30, 1945. Before plaintiffs could institute this action it was necessary that they secure from the Rent Director what is commonly referred to as a "Certificate of Eviction" in compliance with the Rent Regulations promulgated by the Office of Price Administration for the Chicago Defense Area pursuant to the provisions of the Emergency Price Centrol Act (56 Stat. chap. 26, 50 U. S. C. A., Appendix, section 921). On January 27, 1945 a "Certificate of Eviction" pertaining to the apartment in question was issued to plaintiffs by the Rent Director of the Office of Price Administration and a

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JACOB SIECEL and FORA SITEPL, Appellers,

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DAVID J. (AVIS and BIOCH, spectant:

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copy of same was sent to defendants. The certificate contained the following, among other conditions:

"This certificate only authorizes an action to be brought for the eviction or removal of the tenant instituted in accordance with the requirements of local law and does not pass upon the merits of such action under such law.

"Subject to existing lease if any."

on May 1, 1945, the day after the expiration of defendants' written lease, they paid plaintiffs \$50 rent for the month of May, 1945, which was the amount of rent stipulated in said lease, and they received a receipt therefor. Defendants also paid plaintiffs \$50 rent for the apartment for June and July, 1945 and tendered the rent for August, which was not accepted. On the reverse side of the receipt which Jacob Siegel gave defendants for the June rent he wrote: "For month to month tenancy." On June 28, 1945 Jacob Siegel served a written notice on defendants that their tenancy "will terminate on the 31st day of July, 1945" and demanded therein that possession of the premises be surrendered on that day. Defendants refused to surrender possession of the apartment and plaintiffs brought this forcible detainer action on August 1, 1945.

Plaintiff, Jacob Siegel, testified in substance that he listed the property for sale with real estate brokers shortly after he received the "Certificate of Eviction" from the Rent Director in January, 1945 and that it continued to be so listed until June 1, 1945; that the only reason he permitted defendants to remain in the apartment after May 1, 1945 was because they told him on that day and on many occasions prior thereto as well as after that time that they could not find another apartment and requested additional time to find one.

Three witnesses testified on defendants: behalf - the defendants themselves, David J. Davis and Selma Bloch,

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on May 1, 1945, the day paid plaintiffs 30 rent for the unit: written lease, they paid plaintiffs 30 rent for the wenth of May, 1945, which was the decent of rent otipul, ted in said lease, and they received a receipt therefor. Jefendants also paid laintiffs 450 rent for the apartment for June and July, 1945 and teniered the man for most, which was not accepted. On the reverse side of the rectipt which Jacob Siegel gave defendants for the June rent he wrote: "For menth to month tenancy." On June 25, 1945 Jacob degel served a written notice on defendants that their tenancy "will terminate on the 31st day of July, 1945" and leminded therein that posses—sion of the premises be surremained on that day. Defendants refused to currender possession of the apartment and plain-

Plaintiff, Jacob Liegel, testified in substance that he listed the property for sale with real catate brohors shortly after he received the "Certificate of Eviction" from the Ront Director in January, 1945 and that it continued to be so listed until June 1, 1945; that the only reason he permitted defendants to remain in the apartment after May 1, 1945 was because they told him on that day and on many occasions prior thereto as well as after that time that they could not find another apartment and requested additional time to find or.

Three witnesses testified on defendents' behalf - the defendents themselves, David J. Davis and Selma Bloom, Linderson and Selma

his daughter, and the latter's husband, Irwin D. Bloch.

Davis testified in substance that plaintiff, Jacob Siegel, told him in April, 1945 that he was disgusted with the building and asked him if he wanted to buy it; that Siegel said that he only wanted to make \$2,000 profit out of it; that Siegel also told him that he had listed the property for sale and that we would not have to move when our lease expired; and that during April and May real estate brokers brought numerous prospective purchasers to the building.

Irwin D. Bloch testified that in April, 1945 he heard Jacob Siegel tell his wife in their kitchen that defendants would not have to move because he was going to sell the property, that he was disgusted with the property and did not want it and that they could forget anything he had theretofore said about moving.

Selma Bloch testified that sometime in January, 1945
Siegel came to her home and told her that he wanted the flat;
that he came to her home again in February and told her that
he did not want the apartment inasmuch as he was going to
sell the building; that he told her several times thereafter
that they would not have to move because he was going to sell
the building; that on May 1, 1945 he accepted from her the
rent for the month of May and at that time the building was
still listed for sale; that on June 1, 1945 he gave her a
receipt for the June rent and made the notation on the
reverse side thereof, "For month to month tenancy"; and
that he then insisted for the first time since January 1945
that we move out of the apartment.

Defendants contend that "the acceptance of the May, 1945 rent after the expiration of the existing lease, without

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his daughter, and the latter's husband, Irvin D. Elech.

Davis testified in substance that plaintiff, Jacob Glogel, tell him in April, 1945 that he was disgusted with the building and asked him if he wanted to buy it; that Siegol seid that he only manted to make CC, CCO provit out of it; that liegel also teld him that he had listed the property for sale and that we would not have to heav then our lesse expired; and that during april and thy real estate brokers brought namerous prospective purchasers to the building.

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Siegel came to her home one told and and he want dead that he came to her home egain in Webrarry and told her that that he came to her come again in Webrarry and told her that he did not want the opertheent incomed as he was going to sell the building that he told her cause in was going to that they would not have to move because he was going to sell the building; that on May 1, 1945 he accepted from her the rent for the month of May and at that time the building was still listed for sale; that on June 1, 1945 he gave her a receipt for the June rent and made the notation on the reverse side thereof, "For month to month tenency"; and that he then insisted for the apartment.

Defendants contend that "the acceptance of the May, 1945 rent after the expiration of the existing lease, without

any new agreements being made, created a 'hold over' and became a tenancy from year to year" and that "a tenancy from year to year can not be terminated by the service of a thirty day demand notice but must be terminated in accordance with the statute which requires the service of a sixty day notice, in writing, within four months preceding the last sixty days of the year."

Plaintiffs' position is that "a month to month tenancy was created here, so that acceptance of the May, 1945, rent after the expiration of the existing lease did not create a holdover so as to become a tenancy from year to year, but created a month to month tenancy which was terminated by service of demand for possession on June 28, 1945, demanding possession of the premises on August 1, 1945."

In bringing this action it was necessary for plaintiffs to proceed in compliance with the Illinois statutory provisions pertaining to the institution and maintenance of a forcible detainer suit.

The only question presented for our determination is whether on and after May 1, 1945 defendants occupied the premises as tenants from year to year upon the same terms as provided in the original lease or whether they were merely tenants from month to month commencing on said date. There are certain settled principles of law and applicable statutory provisions that are controlling in our consideration of this question.

It has been repeatedly held that if a tenant under a demise for a year or more holds over at the end of his term without any new agreement with his landlord he will be treated as a tenant from year to year subject to the terms of the original lease. (Johnson v. Foreman, 40 Ill. App. 456; Hately v. Myers, 96 Ill. App. 217; Goldsborough v. Gable,

any new agreements being made, crestel a 'hold over' and became a tenuncy from year to year's and that ha tenancy from year to year oan not be terminated by the service of a thirty day domand holice but must be terminated in accordance with the stante this requires the service of a sixty day notice, in writing, within four nonths preceding the last sixty days of the year."

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140 Ill. 269; Epostein v. Kuhn, 225 Ill. 115; Bell v. Groom, 224 Ill. App. 58; Cottrell v. Gerson, 296 Ill. App. 412.)

Section 5 of the Landlord and Tenant Act (par. 5, chap. 80, Ill. Rev. Stat. 1943) provides as follows:

"In all cases of tenancy from year to year, sixty day notice, in writing, shall be sufficient to terminate the tenancy at the end of the year. The notice may be given at any time within four months preceding the last 60 days of the year."

A tenancy from year to year can only be terminated by notice in writing in accordance with the foregoing statutory requirements and if it is not so terminated, an action of forcible detainer cannot be maintained. (Streit v. Fay, 230 Ill. 319; Bell v. Groom, 224 Ill. App. 58.)

If it is shown that a month to month tenancy was created by a new agreement between the landlord and tenant to become effective upon the expiration of the lease, then a 30 day notice in writing is sufficient to terminate such tenancy.

solely upon the uncorrobrated testimony of plaintiff, Jacob Siegel. After admitting that he had accepted \$50 from defendants on May 1, 1945, the day after the lease expired, for the May rent and gave them a receipt therefor, he stated that at that time he advised the defendant, Selma Bloch, that he wanted the apartment but that he permitted the defendants to continue in possession thereof because they told him that they could not find another apartment. Siegel did not testify nor can it be reasonably inferred from his testimony that on May 1, 1945 or prior thereto he made any new agreement with defendants in respect to the nature of their tenancy commencing on said date. It was only after his attorney learned that Siegel had accepted the May rent and permitted defendants to remain in possession of the premises without making a new

140 111. 269; Datein v. Taim, 215 111. 115; Bell v. Group, 124 111. 20. 5°; Cottail v. Geroon, 270 117. 20. 413.)

Jostfan j o' the Estalord in Parity let (prr. f, cheg., 90, 111, nev. tst. 1943) prevides at follows:

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the finding and judgment of the trial court were based solely upon the uncorrobrated testiment of philatilif, Jacob idegel. Ifter aumitting that he had accepted 450 from defendants on May 1, 1745, the day often the last expired, for the last on May 1, 1745, the day often the last for, he stated that that the he advised the defendant, relacitory that he wanted the spartment but that he permitted the infrudents to continue in pessession thereof because they told him that they could not find another apartment. Hegel did not testify nor can it be reasonably inferred from his testimony that on May 1, 1945 or prior thereto he made cay new agreement with defendants in respect to the nature of their tenancy commencing on said date. It was only after his attorney learned that remain in pessession of the premises without making a new remain in pessession of the premises without making a new

agreement with them as to their future occupancy of same that Siegel upon the advice of his lawyer made the notation, "For month to month tenancy," on the receipt that he gave them for the June rent. Siegel's attempt to create a tenancy for month to month or to furnish evidence of his intention to do so by the foregoing notation on the June rent receipt could not possibly serve to change the legal effect of plaintiffs' failure on or before May 1, 1945, when they accepted the May rent, to make a new agreement with defendants as to the nature of their tenancy upon the expiration of the term of their lease.

Since there is no evidence in the record which tends to show that plaintiffs made a new agreement with defendants that the latter were to occupy the premises as tenants from month to month upon the expiration of the term of their lease, we are impelled to hold that defendants held over as tenants from year to year, that plaintiffs 30 day notice was insufficient to terminate such tenancy and that this action of forcible detainer cannot be maintained by them.

The judgment of the Municipal court of Chicago is reversed and judgment is entered here in favor of defendants and against plaintiffs.

JUDGMENT REVERSED AND JUDGMENT HERE.

Friend, P. J., and Scanlan, J., concur.

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The judgment of the Danisipal court of Unicago is reversed and judgment is entered here in favor of defendents and against plaintiffs.

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Friend, P. J., and Countar, J., concur.

EDWARD M. HART,

apperiee

v.

FINLEY W. BROWN,
Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

328 I.A. 133

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 6, 1945, plaintiff brought an action of forcible detainer in the Municipal court of Chicago, against defendant, to recover possession of the first apartment of 1501 Juneway Terrace, Chicago. The case was heard before the court without a jury, there was a finding and judgment in plaintiff's favor and defendant appeals.

The record discloses that prior to May, 1942, plaintiff, who was then about 26 years of age, lived with his father. Erick Hart, and his mother in a 14-room residence at 1501 Juneway Terrace, Chicago. Some time thereafter, the family moved to 1425 Juneway Terrace and remodeled the 14-room residence into a 3-apartment building; a 5-room apartment on the first floor: a 4 or 5 room apartment on the second floor, (the evidence is not clear which) and a 2-room apartment in the basement. In the early part of 1942, defendant and his wife spoke to Erick Hart, about renting the first floor apartment and he agreed to do so for \$90 a month, and that he would prepare a written lease covering a period of two years. Defendant moved into the apartment in April, 1942. That afterward Erick gave a written lease and copy to defendant to execute and shortly thereafter, defendant signed the two and returned them to Erick Hart, according to defendant, within 20 days, but according to Erick, about

EDWARD I. HARF, Appellos,

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FINLEY W. BROWS, Appellant.

THOU TOTAL TOTAL ACTION ACTION

MR. JUSTICE C'IOGGOR DELIVERS ET GRISION CI I COURT.

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2 months after they had been delivered to defendant. The written lease was never executed by plaintiff or his father, or returned to defendant. The defendant moved into the apartment before the lease was prepared, occupying it continuously and paying the rent of \$90 per month by check to the father, Erick.

Mrs. Hart died in 1943 and plaintiff, her son, a bachelor, who had been living with his parents, moved with his father, Erick, to the apartment on the second floor at 1501 Juneway Terrace. In November, 1944, Erick remarried and about that time, asked defendant to vacate the apartment and to move upstairs in the apartment occupied by plaintiff and his father. reason for this, as testified to by plaintiff, was that he had no bedroom in the apartment which he, his father and step-mother occupied and had to sleep on a couch, while the apartment on the first floor, where defendant lived, had two bedrooms. That defendant refused to exchange apartments on the ground that 1t was physically impossible for his wife and two children, ages ome and three years, to move upstairs to the second floor apartment and that there was but one exit from that apartment. Afterward defendant's attention was called by Erick, to an available apartment at 5621 Kenmore avenue and to a house at 7043 North Mason avenue, but defendant rejected these properties because they were inconvenient.

Two notices were prepared by Erick Hart and served on defendant, demanding possession of the premises for Erick, and afterward a third notice was prepared, of like import, in the name of plaintiff and served on defendant and on the O. P. A. prior to the beginning of the suit. The evidence shows that plaintiff was the owner of the property; that on February 1, 194h, it was conveyed by warranty deed by Elin M. Nelson, a widow, to Esther D. Hart and Edward M. Hart, (Esther being Edward's mother) in joint tenancy, The deed was acknowledged

2 months after they had been delivered to defendant. The written lease was never executed by plaintiff or his father, or returned to defendant. The defendent moved into the apartment before the lease was prepared, occupying it continuously and paying the rent of ASO per month by check to the father, frick.

Mirs, Mart died in 1945 and claintiff, her son, a bachelor, who had been living with his persons, so so with his fetence, Erick, to the apertment on the second floor at 1501 Juneta, Terrace. In Worken r, 1946, Smick remarried and about that time, asked defendant to vacate the controvat and to move upotaire in the apartment occurred by plaintiff and his father, The reason for this, se testified to by plaintiff, see that he had no bedroom in the apartment which he, his fa her and elec-wother occupied and bad to sleep on a couch, while the apartment on the first floor, where defendent lived, had two begrooms. That defendant refused to exchange upertaents on the ground that it was physically impossible for his wife and two children, ages one and three years, to move upstairs to the second floor apartment and that there was but one exit from that apartment. Afterward defendant's attention was called by drick, to an available apartment at 5621 Kenmore avenue and to a how e at 7045 North Mason avenue, but defendant rejected these properties because they were inconventent.

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by the granter on the day of its date and filed for record in the Recorder's Office of Cook county, February 13, 1941, so that after the death of the mother, the property was owned by plaintiff, her son, and that plaintiff's father had no interest in it except that he was occupying the apartment there, as above stated.

Counsel for defendant says that section 6(a) of the O. P. A. Act, which is applicable, provides that "Occupancy by landlord, The landlord owned, or acquired an enforceable right to buy or the right to possession of, the housing accommodations prior to the effective date of regulation (or prior to October 20, 1942 where the effective date of regulation is prior to that date, or prior to November 6, 1942 for housing accommodations with the Hastings Defense-Rental Area), and seeks in good faith to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself." And it is agreed that plaintiff is not seeking to occupy the apartment for himself, but for his father, step-mother and himself and has not acted in good faith. This contention cannot be sustained. We think it is clear from all the evidence, that plaintiff wanted the apartment for himself, his father and his step-mother, And the fact that Erick, the father, gave two notices and served them on defendant, that he desired to occupy the premises, was in no way binding on anyone, because the property belonged to his son. The lease in which he was named the lessor was prepared by Erick and delivered to defendant. Erick testified that after he prepared the lease he delivered it to defendant who, sometime afterward signed it and returned it to Erick. This the record discloses, was after defendant moved into the apartment; that Erick and defendant met and it was orally agreed that the tenancy should be from month to month and therefore no written lease was necessary and that he

by the grantor on the day of its date and tiled for record in the Recorder's Office of Orok county, February 13, 1041, so that after the death of the mother, the property see owned by plaint fr, her can, and took plaintiff's father had no interest in it except that he was occupying the sourceast there, as above states.

Counc 1 for defendant mays und section 6's) of the O. F. A. Act, which is applicable, provides that "Queumnack by landlord, the Lastlerd brand, in control and throllers of right to buy or the right to pose raion of, the boust a wead modetions prior to the efficiency date of regulation for mit it to repobles 20, 1920 forms the officialized arts or nemilation to prior to that deta, ar exter so . or every d, lest the boarder, non a mediation a sittle than the person e-terms to the arman, and THE TABLE TODGE WELF TO BUIL HOUSEN TO VOTED OF ARLEST FORE AR STORE for immediate use and previous as a continue for missoil. and is a compact of the latter of the latter of the compact of the apartment for alreeds, but for his cities, et -action the chmaelf and has not acted in south faith. This autervice of , consider this in more thank is it is indeed, be abadistant ed that plaintiff cented the evartowert for himself, its father and bis at p-sather. and the fact that intak, the fateer, ear of horisah of the gradinated on made beween bos secitor out occupy the moveder, we had no way shiding on copyone, because the property belonged to bis cop. The least in which he was nemed the leasur was mrepured by Erlok and delivered to defendant. Fried fostified additional action and entire large be led very Tearrates and the main are corrected the main and real to the it to Prick. This the record discloses, was after defendant Il bus Jem Juahnete has Zoira Jadt ; themtrags ent ofal bevom of Tine word to the tenancy should be from month to month and therefore no written lease was necessary and that he afterward destroyed the lease and copy. This conversation is denied in toto by defendant. But we think this conflict in the testimony is in no way controlling for the reason that Erick did not own the property but it was owned by his sen, the plaintiff.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and Niemeyer, J., concur.

afterward destroyed the lease and coop. This conversation is denied in toto by defendant. But we think this conflict in the testimony is in no way controlling for the reason that Erick did not own the property but it was owned by his son, the plaintiff.

The judgment of the Municipal court of Chicago is affirmed.

.CO. FIRST THRMOTUS

Matchety, P. J., and Measyrn, J., concur.

GEORGE W. SMITH, doing business as PERFECT PEERLESS CALENDAR COMPANY,

Appellee,

GEORGE J. BLOOM.

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT. On July 13, 1943 George W. Smith, doing business as Perfect Peerless Calendar Company, filed a four count complaint in the Superior Court of Cook County against George J. Bloom, The first count alleges that on or about September 29, 1942 defendant sold to plaintiff a 40-inch Sheridan Power Paper Cutter, with automatic clamp and motor; a Miller-Simplex Printing Press, with two motors; a Miller High-speed press with motor, for \$2,750; that defendant agreed to install the presses and other equipment in first class working condition in plaintiff's place of business; that plaintiff then paid to defendant \$1,000; that he thereafter paid to him an additional \$625; that he agreed to pay the balance of \$1,125 when the chattels were installed in first class working condition: that defendant warranted that the presses and cutter would operate in an efficient manner and for the purposes for which they were sold by defendant; that the presses and cutter were delivered; that they did not operate, perform, print or cut and were worthless and useless for the purposes for which they were purchased; that defendant, without success, attempted to repair them; that they were useless and of no value to plaintiff; and he asked damages in the sum of \$6,182.95. The second count alleges fraud and deceit. Count three alleges that defendant

MR. JUSTICH BUNG DELIVER DEFINE FOR FORE WORLD

On July 1d, 1945 George W. Saith, Coins bisiness as Perfect Peerlead Galeral w Convers, filed . frup count com laint in the Superior Court of Gook County springs from J. Sporm. The first count slickes that on or about entember 'C. 1999 defendant sold to nitiatiff a 40-inal Themi'en Porer Perer Getter, with sutomatic clamp and actor; a Miller- Amelex Princing Press, with two motors; a Miller Migh-esons seath actor, for .2,780; that defendant agreed to install the persent and other endingent in first class working condition in plaintiff's place of business; that plaintiff then paid to defendant 1,000; that he thereafter paid to him an additional sadd; that he saw at to say the baltnee of \$1,125 when the chattels were thatalled in first close working condition: that defendant verianted that the receive and outter would operate in an efficient manner and for the surposess for which they were sold by defendent; that the preses and outter were delivered; that they did not operate, perform, orint or cut and were worthless and useless for the purposes for which they were purchased; that defendent, without success, attempted to repair them; that they were useless and of no value to plaintiff; and he asked damages in the sum of \$5,132.95. The second count slleges fraud and deceit. Count three alleges that defendant

Saused to be issued by the clerk of the Circuit Court of Cook County a writ of replevin for the chattels in an action against Henry J. Volstad, Richard Roe and Mary Roe; that the sheriff took the chattels under the writ from plaintiff's premises and delivered them to defendant; that thereby defendant converted the chattels to his own use; that defendant unlawfully took possession of the chattels without the consent or knowledge of plaintiff and without making plaintiff a defendant in the replevin action. The fourth count is for money had and received. A motion to dismiss the complaint was overruled. Defendant, answering, joined issue as to the material allegations of the complaint. A trial before the court and a jury resulted in a verdict against defendant for \$4,000. Motions by defendant for a directed verdict, for judgment notwithstanding the verdict, for a new trial and in arrest of judgment, were overruled. On a remittitur of \$1,030 the court entered judgment on the verdict for \$2,970 and defendant appealed.

Plaintiff, George W. Smith, is in the business of selling printed calendar pads. He is 81 years of age and hard of hearing. He had at one time been in the printing business, but did not call himself a printer. He lets the printing of the calendar pads out on contract. He has been in that business for 21 years. He has an office at 176 West Adams Street, Chicago. He leases 90 square feet of space on the third floor at 637 South Dearborn Street, Chicago. Otto Regaer, a bookbinder and calendar manufacturer, and Clarence Mattson, a printer, under arrangements with plaintiff, occupied this third floor space (except an additional small office maintained by plaintiff), for use in their respective businesses.

It will be observed that the complaint alleges that the two printing presses and the cutter were sold by defendant to plaintiff on or about September 29, 1942 for \$2,750. The evidence, however, shows that the paper cutter and the Simplex press were purchased on September 29, 1942 or September 30, 1942 for \$2,750

Sensed to be issued by the clerk of the Circuit Court of Gook County a writ of replayin for the chattels in an action against Henry J. Volsted, Richard Noe and Mary Roe; that the aberiff took the chartele under the writ from plaintiff's creaises and delivered them to defendant; th t thereby defendant convented the chattele to his own use; that forendent unlawfully took possession of the chattels without the consent or knowledge of plaintiff and without making plaintiff a defendant in the replayin action. The fourth count is for money had and received. A motion to disaise the complaint was everruled. Defendant, answering, joined is the as to the material silegetions of the convicint. A trial before tol inchmoles denies tollary a mi betterer want a bas truco edt 4,000. Motions by defendant for a dissated verdint, for judgment notwithstanding the vardict, For a new irla and in Arrost of judgment, were overgulad. On a remittivur of 1.070 the count entered judgment on the verdiet for Riffo and defendant conceled.

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It will be observed that the complaint ellegen that the two printing presses and the outter were sold by defendant to plaintist on or about September 29, 1942 for 12,750. The evidence, however, shows that the paper sutter and the Simplex press were purchased on September 29, 1942 or September 30, 1942 for 12,750

and that the Miller high speed press was purchased on October 29, 1942 for \$500. These were separate transactions in which the purchaser agreed to pay the aggregate sum of \$3,250. Defendant, George J. Bloom, had been in the printing machinery and financing business for 25 years, with an office at 188 West Randolph Street, Chicago. He had known plaintiff for 10 years, but had not sold him any printing machinery. Plaintiff testified that he was approached by the defendant with an offer to sell him the machinery and that defendant instructed Henry Volstad to go with plaintiff to inspect the machinery at a plant on the near north side of Chicago. Plaintiff testified further that after viewing the machinery, he purchased it; that defendant assured him that the presses and cutter were in good condition; that defendant agreed to deliver the chattels to the Dearborn Street plant; that after delivery plaintiff endeavored to get the press to operate; that it would not operate satisfactorily; that defendant sent men who endeavored to get the press to operate; and that despite these efforts the press was not put in condition to operated,

Henry Volstad; that plaintiff did not wish to be the purchaser; and that Volstad was supplied with the money paid on the purchase price on an arrangement between plaintiff and Volstad. The contention of defendant that he sold the chattels to Volstad is sustained by the evidence. The testimony of plaintiff that he was the purchaser is opposed by the overwhelming weight of the evidence. The paper cutter first viewed by plaintiff could not be procured by defendant and the latter substituted a different paper cutter. The paper cutter delivered, however, was satisfactory, as was the Miller high speed press. Plaintiff's asserted grievance is that the Simplex press did not operate in a satisfactory manner.

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Henry Volsted; the t plaintiff die not sish to be the ourobecer; and that Volsted was and lied with the noney paid on the ourobacer; and on an arrangement between claintiff and Volsted. The contention of defendant that he cold the chattels to Volsted is sustained by the evidence. The testimony of plaintiff that he was the purchaser is opposed by the overwhelming veight of the evience. The proof outter first viewed by plaintiff could not be procured by defendant and the latter substituted a different paper cutter. The paper outter delivered, however, was satisfactory, as was the Miller high speed press. Plaintiff's asserted grievance is that the Simplex press did not operate in a satisfactory manner.

Defendant, as vendor, and Volstad, as vendee, signed a conditional sales contract dated September 30, 1942 covering the sale of the cutter and the Simplex press for \$2,750. This contract acknowledged the receipt by vendor of \$1,000 in cash and therein the vendee promised to pay the balance of \$1,750 in four monthly installments beginning October 30, 1942, the first three installments being for \$500 each and the final installment for \$250. At the time of the execution of the conditional sales contract Volstad also delivered to defendant a promissory note for \$1,750, payable as agreed in the contract, On October 29, 1942 defendant, as vendor, and Volstad, as vendee, executed a conditional sales contract for the Miller high speed press, the purchase price being \$500. The contract acknowledged receipt of \$125 in cash and therein Volstad promised to pay the balance of \$375 in eight consecutive monthly installments beginning November 29, 1942, seven installments for \$50 each and the final installment for \$25. Volstad also executed a promissory note for \$375, payable as agreed in the contract. Plaintiff testified that he did not know about the conditional sales contracts. Plaintiff testified that on November 19, 1942, addressing defendant, he said: "I've got no receipt for what I've paid you. I've got nothing to show I paid you \$1,000 on this and when you get up the receipt you and Mr. Volstad give me the receipt for both and I'll give you \$500 more." Witness testified further that: "They wrote up the receipt and brought it in. " The receipt, signed by defendant and dated November 19, 1942, reads: "Received from Perfect Peerless Calendar Company, on Sept. 29, 1942 One thousand dollars as first payment of \$2750, purchase price on one 44 inch Power paper cutter with automatic clamp and motor for same. Also one Miller Simplex printing press with two motors, D. C. current, both machines in good working order, delivered to 3rd floor at 637 Sou, Dearborn St.; Then few days later received One Hundred Dollars eash payment on a Miller High Speed press, price with motor

Defendent, as vendor, and Voletad, as vendes, signed a conditional sales contract dated destanber 30, 1948 covering the sale of the outter and the bimplex press for ?, 750. This contrast acknowledged the receipt by ventor of 41,000 in oran and tarrein the vendes promised to pay the balance of al. 750 in four monthly installments begining detected 10, 1944, the first three installments being for .068: you install installment for .880. It the time of the execution of the conditional sales contract Volsta aleo delivered to de endant a premissory note for 1,750, eageble as agreed in the contract. On Dejoter O., 1945 defordent, as vendor, and Voleted, as vendes, executed a conditional seles contract for the Miller high speed press, the coroners order being . 500. The bad-lov gianeit ton drop of CSI. To delener Bookslavendos tostanos promised to pay the balance of 375 in signs consecutive worthly installments beginning Movember 29, 1945, seven installments for \$50 esch and the final installment for .25. Volatad also executed a promissory note for (27%, payable as agreed in the contract, Plaintiff testified that he did not know about the conditional sales contracts. Flaintiff testified that on Kawamber 19, 1945, addressing defendant, he said: "I've got no receipt for what I've baid you. I've got nething to show I paid you "1.000 on this and when you get up the receipt you and Mr. Volstad give me the receipt for both and I'll give you \$500 acre." Attness testified further that: They wrote up the receipt and brought it in, " The receipt, Elened by defendant and dated November 18, 1942, peade: "Acceived from Perfect Pestless Galender Company, on Sept. 28, 1942 One thousand dollars as first payment of \$2750, purchase price on one 44 inch Power paper cutter with automatic clamp and motor for ease. Also one Miller Simplex printing press with two motors, D. C. current, both machines in good working order, delivered to 3rd floor at 537 Sou, Dearborn St.; Then few days later received One Rundred Dollars ossh payment on a Miller High Speed press, price with motor delivered to 3rd floor at 637 Sou. Dearborn St. \$500. with \$100. paid down; Balance on all machines to be paid in monthly payments of notes. Also, received today, Nov. 19th, 1942 \$525. cash to apply as second payment on the Miller Simplex and Sheridan Cutter now in use on 3rd floor at 637 Sou. Dearborn St. and proving very satisfactory in work. Also balance for moving \$50 and sales tax."

Although the receipt acknowledges that the payments were made by the plaintiff, it omits any reference to plaintiff as the purchaser. The statement in that receipt that "balance on all machines to be paid in monthly payments of notes", manifestly refers to the two notes executed by Volstad. Plaintiff did not sign any notes. The receipt sets out the terms of the two sales substantially as shown in the conditional sales contracts and strongly supports the position of defendant. The conditional sales contracts receipted for the down payments of \$1,000 and \$125. The receipt given to plaintiff on November 19, 1942 would be valuable to him as evidence of the payments made by him under whatever business arrangement he had with Volstad. Defendant and his witnesses testified that the receipt, except the clause acknowledging \$50 for moving and sales tax, was prepared by plaintiff on his typewriter and submitted to defendant for his signature.

The record shows that on November 19, 1942 plaintiff had paid on the cutter and the two presses and for moving and sales tax, the sum of \$1,675. As the total purchase price on the two transactions was \$3,250 and plaintiff paid defendant, to be credited to Volstad, \$1,625, there was a balance due to defendant from Volstad of \$1,625, excluding the item for moving and sales tax.

Neither Volstad nor plaintiff made any attempt to pay any part of this balance. Plaintiff did not rescind either of the sales, nor did Volstad. When Volstad defaulted in paying the installment

delivered to 3rd floor at 637 Sou. Dearborn St. 1500. with +100. paid down; Balance on all machines to be paid in monthly payeents of notes. Also, received today, Nov. 19th, 19e2 -555. ceah to apply as second payeent on the Miljar Simplex and Sheridan Cutter now in use on 3rd floor at 637 Sou. Dearborn St. and proving very satisfactory in work. Also balance for reving 150 and sales tex."

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The record shows that an Movember 18, 1842 plaintiff had paid on the cutter and the two present and for moving and sales tax, the sum of \$1,675. As the total purchase price on the two transactions was \$5,250 and plaintiff paid defendant, to be eradited to Volstad, \$1,625, there was a balance due to defendant from Volstad of \$1,625, excluding themisen for moving and sales tax. Weither Volstad nor plaintiff made any attempt to pay any part of this balance. Plaintiff \$1d not rescind either of the sales, nor this balance. Plaintiff \$1d not rescind either of the sales, nor this balance. Plaintiff \$1d not rescind either of the sales, nor

notes, defendant approached plaintiff and gave him an opportunity to take over the conditional sales contracts and to pay the balances due thereon. This plaintiff declined to do. Defendant then requested that plaintiff permit him to repossess the chattels as provided in the conditional sales contracts. Plaintiff told him he could do so, but when defendant attempted to remove the chattels he was not permitted to take them. Thereupon, defendant brought a replevin action in the Circuit Court for the purpose of repossessing the chattels, naming as defendants, Henry J. Volstad, John Doe and Mary Roe. The Sheriff's return shows that he served the replevin writ on "George Herman Smith, herein named as John Doe, " on March 23, 1943. The writ was served at plaintiff's premises on Dearborn Street and the chattels were taken from that location. The Circuit Court found that the right of possession to the chattels was in the plaintiff therein, George J. Bloom, and entered judgment accordingly. Plaintiff, Smith, knew that the chattels were taken from his premises on a replevin writ sued out by defendant. Nevertheless, he did not appear in that case or assert any right of ownership or possession in the chattels, nor did he attempt to set aside the judgment. According to plaintiff's theory, not having rescinded the sale, he was entitled to possession of the chattels. Assuming that he is right in his claim that the sale was to him and that there was a breach of warranty, he could have successfully resisted Bloom's replevin action by proving that he was the purchaser; that there was a breach of warranty; that he was damaged in an amount greater than the balance due on the purchase price; and that he was entitled to retain possession of the chattels. Under such an assumption he could also counterclaim against Bloom for whatever additional damages he could prove.

notes, defendant approached plaintiff and gave him an opportunity to take over the conditional seles contracts and to pay the balances due thereon. This plaintiff declined to do. Defendant then requested that plaintiff parmit him to remossers the chattels Blot Tituials. Placed to seles canditioned and the babies as him he could do so, but when detendant attempted to remove the chattels he was not pormitted to take them. Thereupon, defendant baseauc and real sauce simple direct or the restaurant surpresentation of the contract of the of repossessing the chettels, neming as defandents, Henry J. Volstad, John Doe and Mary one. The Mberliff's return chows that he served the repletin with on "George Kermen watth, herein named se John Doe," on Marah 25, 1945. The writ was served at plaintiff's promises on Dearborn Street and the coaftely were awan from that location. The Gircuit Vourt found that and all of nothersing to the chattele was in the claimtiff thereis, twomend. Income and entered judgment secondingly. Plaintif, Smith, know that the chattols were taxen from his areaises on a monlevin unit ched out by defendant. Hevertheless, be did now so wer in that case or assert any right of empercise or nessession in the chattele, nor did he attement to set meide the judgment. Accoming to plaintiff! theory, not having rescinded the sale, he was entitled to nessayalon of the chattels. Assuming that he is right in his claim that the sele was to him and that there was a broad of warranty, he could have successfully resisted bloom's replayin action by proving that he was the purchaser; that there was a breach of varranty; that edt ne sub sommaged in an amount greater than the balance aus of purchase price; and that he was entitled to retain nessession of the chattels. Under such an assumption he could also counterclaim against Bloom for whatever additional demages he dould prove.

silence then is inconsistent with the position he now assumes. Four months after the chattels were repossessed he brought the instant action.

Defendant introduced testimony that the reason the Simplex press would not operate properly was because the temperature in the premises was 62 or 63 degrees, whereas the proper temperature for a pressroom is 80 degrees. Plaintiff did not introduce any countervailing testimony on this point. The testimony is undisputed that the press would not function properly at the temperatures maintained in the premises.

Count 1 of the complaint is founded upon a breach of The second count alleges fraud and deceit. This was warranty. stricken at the close of plaintiff's case. The third count is for a wrongful replevin and conversion of the machinery. proof was submitted to support this count. The fourth count is for money had and received. As no rescission of the sale was alleged or proved and as plaintiff sought damages on the theory of ownership, there can be no recovery under that count. Plaintiff's case is based on the following clause of Sec. 69 of the Uniform Sales Act (Sec. 69, Ch. 1212, Ill, Rev. Stat. 1945): "Where there is a breach of warranty by the seller, the buyer may, at his election \* \* \* accept or keep the goods and maintain an action against the seller for damages for the breach of warranty, " Under plaintiff's theory he kept the goods. There was no basis for a verdict for \$4,000. Plaintiff recognized this by consenting to a remittitur reducing the judgment to \$2,970. This amount represents \$1,625 paid on the purchase price of the chattels, \$50 moving expense and sales tax, and \$1,295 claimed by plaintiff to have been paid by him as penalties imposed by the Government

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Defendant introduced isstimony that the resent the Simplex prese would not operate proverly are broades to temperature in the cremises was 30 or 35 degrees, whereas the proper temperature for a orestroom is 30 degrees. Plaintiff did now introduce any countervalling testimony on tale point. The testimony is unliabated that the areas would not fraction or orby at the temperature returned in the propersion.

in desert a need define that the tyree and to I thurst warranty. The second count alleges froud and costs. I.L. van stricken at the close of claintiff's cast. The third count is for a groupful replivin and conversion is abla continers. For al the fraction of the same this sound, the fraction as to ore for money had and reactived. As no reacted an of him till each allead or active and are califitts active to sever to the visits as of ownership, there our be no moreny under that must, alimtiff's cose is baced on the fallowing clapse of to. Se at the Uniform Sales Act (+90, 68, th. 1814, Ill. 46v. Stat. 1946): "Where there is a breach of warranty by the seller, the buyer day, st his election " " saceor to keep inc , and selection a nichican action against the seller for demayes for the breach of warracty," Under plaintiff's theory to kept the goods. There is no basis for a verdiet for '4,000. Plaintiff recognized this by conscnting to a remittitur reducing the judgment to 2,970. This amount represents \$1.625 paid on the ourchase orice of the chattele, \$50 moving expense and sales tax, and w1.295 claimed by claintiff to have been paid by him as pensities imposed by the Government

because he defaulted in his contracts. The evidence does not show that any penalty payments to the Government were caused by the failure of the press to operate. Plaintiff asserted in his verified complaint that the penalties he was required to pay to the Government for failure to ship pads was \$205.45. Plaintiff did not make any attempt to prove the difference in the value of the Simplex press as delivered and as warranted.

We find that the judgment is contrary to the manifest weight of the evidence. The judgment of the Superior Court of Cook County is reversed and the cause remanded with directions to proceed in a manner not inconsistent with these views.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

because he defaulted in his contracts. The evidence does not show that any penalty payments to the Government were caused by the failure of the press to operate. Plaintiff asserted in his verified complaint that the panalties he was required to say to the Government for failure to ship and was 205.45. Plaintiff did not news any attendt to prove the difference in the value of the cinclex press as delivered and as supremod.

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TOURS F. J. C. CORT. GARD AVER TWO WEARS .

KILEY, P.J. AND LEWE, J. CONCOL.

In the Matter of THE PETITION OF ANTHONY VOLPE TO BE ADMITTED A CITIZEN OF THE UNITED STATES OF AMERICA.

ANTHONY VOLPE,
Petitioner-Appellant,

٧.

UNITED STATES OF AMERICA, Respondent-Appellee.

APPEAL FROM SUPERMOR COURT COOK COUNTY.

323 I.A. 311

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Petitioner appeals from an order dismissing for want of jurisdiction his petition filed August 24, 1945 to set aside and expunge from the record an order entered April 3, 1920, vacating a prior order admitting petitioner to citizenship of the United States and directing that his petition for further naturalization stand for/hearing, and an order entered March 28, 1924 on petitioner's motion, dismissing his petition for naturalization.

March 27, 1920 on petitioner's application for naturalization, filed pursuant to the federal act of 1996, an order was entered admitting petitioner to become a citizen of the United States, and a certificate of naturalization was issued. April 3, 1920, an order was entered reciting: "Upon further consideration of the above entitled petition, and the motion of the United States filed herein and the addidavit thereto attached, IT IS HEREBY ORDERED that the order of Court heretofore entered at this term of Court, on March 27, 1920, be vacated and set aside and that the petition stand for further hearing." This order further directed that the petitioner surrender the certificate of naturalization issued under the order vacated, and that the certificate be canceled. March 28, 1924, upon the

In the Matter of for Portlan of A METTINGA BE OF STLICY YNORTHA TO SETATE GETINU MHT TO MESETIO AMPLICU.

AMERON Y VOLPE,

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UNITED STATES OF TAX TINE, Rescondent-Appeller.

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March 27, 150 on setitioner's scalingtion for asturalisttion, filed garage. I to the foueral not of 1-60, an order an entered admintant portitioner to become a citizen of the United States, and a certificate of naturalization can insued. April 1920, an order are entered resiting: "Upon further considerstion of the above entitled petition, and the sotion of the United States filed berein and the addidayit thereto attached, bereine ercrotared truco to serve and test GP-NGRO X6. FRH BI TI at this term of Court, on March 27, 1920, be vaceted and set aside and that the petition stand for further hearing." order further directed thatting patitioner surrender the certificate of naturalization issued under the order vacated. March 28, 1924, upon the and that the certificate be canceled. motion of petitioner, his petition for naturalization was dismissed.

The petition filed August 24, 1945, on which the present proceeding is based, recites the issuance of a certificate of naturalization to petitioner on March 27, 1920 on the order mentioned above; that petitioner had no notice of the motion to vacate the order admitting him to citizenship, and that the order of April 3, 1920 was entered "without his being notified of same and without opportunity for a hearing on same"; that thereafter, "under misrepresentation made to him by representatives of the United States, whose names he does not now remember. " as to the validity of the order of April 3, and under promises by the same representatives that a new certificate of naturalization would be issued on a further consideration of his petition, he surrendered his certificate of naturalization; and that thereafter, "on the 24th day of March 1924 under representations by representatives of the United States, whose names becomes not now remember, falsely and fraudulently made, that (of) he would dismiss his said naturalization petition they would withdraw their objections to a later petition and would accept or consent to his later petition for naturalization at a later date; and your petitioner, relying on the aforesaid representations, and having full confidence in the representatives of the United States, and their expressed intention to assist him, made no inquiry or investigation to ascertain the truth, merit or validity or legality of the action suggested in the aforesaid representations, and he was persuaded to sign a request that his petition for naturalization be dismissed, and on March 28, 1924, on said request, of which motion and the making of same your petitioner had no notice and no opportunity for a hearing, he not being present or being represented in Court, an Order was entered in this Court by Judge Emanuel Eller dismissing your petitioner's petition for naturalization"; that the court was

motion of petitioner, his petition for naturalization was diamissed.

The petition filed Augunt od, ledf, on which the pr-sent proceeding is based, recites the issuence of a certificate of naturalization to petitioner on hereh 27, 1920 on the neder estioned above; the toelist oner had as portee of the motion to vacate the order administration of mid tendering, and thet the order of April 3, 1980 was entered "ultimate his Melan applifies deadly treasur no voltated a new Yollarthogen frontly bas smar lo chereafter, "wader misreareseath.tion mede to him by mepa cannative of the United States, whose names he does not now remembe, as to the validity of that order of a vil 3, and ender eventeen by the same rooreeantatives that a new certificate of naturalization would be iscued on a further denoideration of his metaties, be eurrendered his cortificate of naturalisation, and that thereafter, "on the 24th day of rorch 1974 under reamscentiff; g by representatives of the United States, Laces names heades not now remember, felec.y and Traudulantay acts, that (Af) he sould ser nois five well noidleng acitabilenutan bias sid asimaib their objections to a later netil on and would ar sit or convent to his later petition for neturalization at a later dela; and your potitioner, relying on the eforestid raprecentations, and having full confidence in the representatives of the United States, and their expressed intention to as ist the, ande no inquiry or investigation to ascertain the train, ment or validity or legality of the action aug; sated in the aforesaid representations, and he was porcuaded to sign a request that his petition for naturallantion be dismissed, and on March .3, 1924, on seld request, of which motion and the making of same your petitioner had no notice and no opportunity for a hearing, he not being present or being represented in Court, an Order was entered in this Court by Judge Emanuel Eller dismissing your petitioner's petition for naturalization"; that the court was

without jurisdiction to enter the orders of April 3, 1920 and March 28, 1924, not only because of want of notice to petitioner of application for the orders and want of opportunity to be heard in opposition to their entry, but because the court had exhausted its jurisdiction by entry of the order of naturalization on March 27, 1920.

To this petition the respondent United States of America filed an answer denying that the court had jurisdiction over it. and asserting that the order of dismissal of petitioner's application for naturalization, entered on March 28, 1924, barred all right to relief. The answer further alleged that petitioner had actual notice of the motion to vacate the order of March 27, 1920 admitting him to citizenship. It denied the alleged representations and promises of the unnamed representatives of the United States and averred that on March 24, 1924 petitioner filed his motion to dismiss his petition for naturalization then pending, on which the court acted March 28, 1924; that thereafter on May 5, 1927 he filed a second petition for naturalization in the Superior court of Cook county, which petition was dismissed October 21, 1927 on his motion. The answer of respondent also sets up the 5 year limitation for correction of errors by motion, substituted for the writ of error coram nobis in section 72 of the Civil Practice Act. This objection need not be considered, as petitioner is not proceeding under that section of the statute, He says in his reply brief, "If the naturalization Court's vacating order is not void then appellant has no case."

Contrary to petitioner's contention, his application for naturalization was a judicial proceeding, subject to all the rules governing such proceedings, and the court in granting or refusing citizenship acted judicially. <u>Tutun</u> v. <u>United States</u>, 270 U. S. 568; <u>In re Fordiani</u>, 98 Conn. 435. Accordingly, the court retained jurisdiction of the subject matter and of petitioner until the expiration of the term of court at which the petitioner was

without jurisdiction to enter the orders of april of a falliner March 28, 1924, not only because of want of sociae to netitioner of application for the orders and want of sociationity to be heard in opposition to their entry, but occase the count had exhausted its jurisdiction by entry of the order of naturalization on march 29, 1000.

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 admitted to citizenship, with full power to open up, vacate or modify any judgment entered. Brelsford v. Community High School 30;

Dist., 328 Ill. 27,/Krieger v. Krieger, 221 Ill. 479,484.

By section 11 of the Naturalization act of 1906 the
United States was cauthorized to appear in any naturalization proceeding and to be heard in opposition to the granting of any
petition. The photostatic copy of the order admitting petitioner
to citizenship bears the notation, "Admitted over objection of
U. S. Examiner," and the order of April 3, 1920 vacating the order
of admission recites that it was made on mation of the United States.
The United States having appeared voluntarily under authority granted
by Congress, it remained a party to the proceeding for all purposes,
and since petitioner's present application is filed in the original
naturalization proceeding, on the alleged ground that the orders
sought to be vacated and expunged are void, the respondent is a
necessary and proper party and its objection that the court is without
jurisdiction of it is untenable.

The order of April 3, 1920 does not show notice to petitioner of respondent's motion. It does recite the filing of respondent's motion, with an affidavit attached thereto showing the presentation of a written motion. Neither the motion nor the affidavit are made a part of the record. Petitioner in his brief says that the record filed in this court "is the copy of everything in the records of this case on file with the Clerk of the Superior court of Cook county from the very beginning ... . The attorney for respondent stated on oral argument that the written motion was missing from the files in the Superior court. The court will take judicial notice that notices of motions are frequently included in the same cover with the motion and supporting papers to which the notice refers. It was not necessary that the order should recite that notice was had on the There is authority to the effect that a court may modify petitioner. or vacate a final order within the term without notice. It is a

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admitted to citizenship, wi a rull pour; to open up, v.c.te or modify any judgment curere. Brelsform v. Gorounity in 50; 50; 111. 27,/Kriener v. integr., c.l III. 67,/d.t.

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general principle that where a court has jurisdiction over the person and subject matter, no error in the exercise of such jurisdiction can make the judgment void. 31 Am. Jur., Judgments, sec. 401. The rules of the Superior court required notice of motions. These rules have the same effect as statutes, and it is said to be the general rule that an order made without notice is void, 37 Am/ Jur., Motions, Rules, and Orders, sec. 9. However, want of notice may be waived, as it goes merely to the jurisdiction of the person. 31 Am. Jur., Judgments, sec. 779. This waiver of notice may be made by appearing and arguing a motion on its merits without objecting to the failure to give notice. Toy v. Haskell, 128 Cal. 558. Notice may also be waived by a subsequent appearance in court and recognizing the validity of the order entered on a motion made without notice. As said in Taylor Coal Co. v. Industrial Commission, 301 III. 381, 384, "The general rule as applied to courts is, that jurisdiction of the subject matter, - which means jurisdiction of the class of cases to which the particular case belongs and not jurisdiction of a case within such a class, - cannot be waived. method by which jurisdiction of a particular case within the general class of casesbis obtained, and any defects or irregularities in respect therete, may be waived, and are waived unless seasonable objection is made in accordance with the established practics. (O'Brien v. People, 216 Ill. 354; Franklin Union v. People, 220 1d. 355.) Where a court has jurisdiction of the subject matter and may take jurisdiction of a particular case if certain conditions exist, and no objection is raised to the exercise of jurisdiction. as in case of a limitation barring a writ of error, an adequate remedy at law and the like, a party will be deemed to have waived the jurisdictional question. Burnap v. Wight, 14 Ill. 303; Stout v. Cook, 41 1d. 447; Crawford v. Schmitz, 139 1d. 564; Hauger v. Gage, 168 id. 365; Law v. Ware, 238 id. 360; Peterson v. Manhattan Life Ins. Co. 244 id. 329; People v. Evans, 262 id. 235,"

general principle time where a court was indisting furner person and subject marter, no error in al . (Moreige of eyen invisation can make the jud west, all in ture, it adverses, each 401. The rites of the Superior court rocaired notice or routers. Tage rules hove the same effect or sterutes, and it is said to be the ceneral rule tact an order said dianch outles is voic. AV asf ್ರಾರ-೧.೧ ೧೯೯೬ ೬೯ ೧೯೨೩ರ ಕ್ರೀಚಾರ್ ಕ್ರೀಚಾರ್ ಆರ್. ಇ. ಅಂಗಳಿಗೆ ಆಹಲ್ಲ್ ಇತ್ತಿ ಇತ್ತು. ಕ್ರೇಚಿತರ್ ಕಾಲ್ ಕ್ರಾಟ್ 31 Am. Jur., Judgmente, orc. This water of motion as in the by appearing and engainer as those on the works of the entrance of the contract of the contrac to the failure to type solute. This, the oil of enalist end of inger through a high common definition of the fact of meagaistmenthe veltality of the order wetered on median wile without notice. As said to to los for the call addition is notice therein 301 Ill. 331, 384, fore rowers early angled to my balls, a t jurishiotion of the subject werto.; - with mean jurichiton of the class of easer to which the artifical area of one and jurisdiction of a sace altain chora ils. of - sac of sa lead, ill method by wideh juringletion of a series also again the memory class of casesbit oftained, and any or inche or immorabiling is respect thereto, asy or wulver, and white wilked uners earns it w objection is made in second and with the set. bilened concrine. (O'srien v. Foorla, 16 Ill. 30: Frentlin is on v. Morte, 180 id. 355.) There is court has juried intien of the old mister and may take jurisdiction of a particular cose if contain conficions exist, and no objection to raised to the eventse of glandiation, as in ease of a limitation perming a writ of error, in edenuare remedy at law end the like, a party will be deemed to her wallethe juristictional question. drawn v. italit, 14 Ill. The Stout v. 300k, al id. 447; Uraviord v. Brinder, 138 id. 564; Hayer v. Gage, 168 1d. 365; Law v. Mane, 288 1d. 350; Peterson v. Manhettan tire Ins. Co. 244 16, 329; People v. Ivons, 262 14. 235.

In the instant case petitioner's subsequent filing of a motion to dismiss his petition for naturalization was a recognition of the validity of the order of April 3. 1920 vacating the prior order of naturalization and continuing the application for naturalization for further hearing, and the order subsequently entered upon petitioner's motion cannot be questioned by him unless the facts set up in the petition now before us are sufficient to raise a question of fact as to his voluntary action in the matter, uninfluenced by fraud or misrepresentations binding the respondent. The petition wholly fails to make such showing. The alleged misrepresentations which petitioner arges as invalidating what appears upon the record as his voluntary action in dismissing his petition for naturalization, are said by him to have been made by representatives of respondent, whose names he does not now remember. Neither the identity or official capacity of the alleged wrongdoer nor his authority to bind the United States is shown. Furthermore, the action of the court could not be controlled by any agreement or recommendation of any representative of respondent, however high his official position. The action of petitioner in moving for dismissal of his petitionsmust, upon the record, be construed as voluntary and therefore as waiving any want of notice of the motion to vacate the order of naturalization.

There is another objection to petitioner's claim of want of notice of this motion. The present petition was not filed until 1945, more than 25 years after the entry of the first order, and more than 21 years after petitioner's dismissal of his application. In 31 Am. Jur., Judgments, sec. 423, it is said, "The presumptions in favor of the regularity of a judgment become stronger with the lapse of years. It has even been said that almost any reasonable presumption of fact will be conclusively indulged in order to sustain rights asserted under a decree which is twenty years old."

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In the instant case petitioner's subsequent filling of a motion to dississ his petition for insturalization was a recognition of the validity of the order of A ril 3, 1920 vacating the prior order of naturalia : ion and no prior edd application for naturalization for further hearing, and the order subsequently entered upon potitionary's motion carried be augenticated by him unless the facts set up in the petition now before us ere sufficient to raise a question of fact as to his valuatory sation in the matter, uninfluenced by freed or misrepresentations win line the respinient. The petition sholly falls to make such shoulds. The alleged misrepresentations which petitioner urges as invelidation any success upon the record as his voluntary action in dismissing his petition for naturalization, are said by him to have been made by representatives of respondent, whose mames he does not now remember. Weither the identity or official expectty of the illneed wrongdoer nor bis authority to bind the United States is shown. Purthermore, the action of the court soul? not se controlled by any agreement or a concendables of any representative of room adout, however bigh his official position. The action of cetificner in moving for dismicral of his petitionness, upon the record, be construed as voluntary and toersfore as weiting any rent of motice of the motion to vacate the order of naturalization.

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(citing Thompson v. Thompson, 91 Ala. 591, and Copelan v. Kimbrough, 149 Ga. 683.) For more than 20 years petitioner has slept on his rights The dismissal of his original petition did not bar subsequent applications for naturalization. If any obstacle to admission to citizenship arose subsequently, it could only have been through the conduct of petitioner. Vacation of the orders complained of would restore petitioner to a status he enjoyed not longer than a week, more than 25 years ago; make him a citizen of the United States and thereby enable him to avoid the consequences of his misconduct, if any, barring a present application for citizenship. Public policy requires that the status of an unnaturalized resident of the United States, in which petitioner has acquiesced for so many years, be continued until such time as the petitioner by a further application demanstrates his right to câtizenship.

The order is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

(otting Thompson v. Thompson, 91 Ala. 591, and Copelan v. Kimbrough, 149 Co. 585.) For more than 20 years petitioner has alept on his rights The dissiscal of his original petition did not bar subsequent apolitutions for naturalization. If any obstacle to admission to citizenship areas subsequently, it could only have been through the conduct of petitioner. V. cetion of the orders con lained of would vertors petitioner to a stabus he enjoyed not longer than a rack, more than 25 years ago; make him a citizen of the United States and thereby enable him to avoid the conscouences of him wisconduck, if any, carriag a present application for alliverable. Public policy requires that the otteles of an unnaturalized resisent of the distant petitioner has acculeded for so many years, be dentinued until such time a the petitioner by a further application demanstrates his right to efficiencies.

The order is affirmed.

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Matchett, P. J., and O'Coaror, J., concur.

466-ILLINOIS APP. 1-328 Ill App Pt 3 61579 4-16 Mullen 8x10x23 CASE-195

Case 195

In re Petition of Anthony Volpe to be Admitted a Citizen of the United States of America. Anthony Volpe, Appellant, v. United States of America, Appellee.

Gen. No. 43,660. (Abstract of Decision.)

ALIENS, § 8 \*—when validity of order in naturalization proceedings was recognized by subsequent filing of motion. Where petition was filed to set aside order vacating prior order admitting petitioner to citizenship, on ground that petitioner had no notice of motion to vacate order, and it appeared that about four years later petition for naturalization was dismissed upon motion of petitioner, held that subsequent filing of motion to dismiss his petition for naturalization was recognition of validity of order which petitioner sought to have set aside.

Appeal from the Superior Court of Cook county; the Hon. U. S. Schwarz, Judge, presiding. Affirmed. Heard in the first division, first district, this court at the February term, 1946; opinion field April 8, 1946. Guy C. Crapple, for appellant; J. Albert Woll, United States Attorney for Northern Dist. of Ill.; Antonio M. Gassaway and John Peter Lulinski, Assistant United States Attorneys, and Dewey G. Hutchinson, United States Naturalization Examiner, Dept. of Justice, Immigration and Naturalization Service. Opinion by Justice Niemeyer, Not to be published in full.

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General Number 9490.

Agenda Number 9.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A.D. 1946.

2/241

SILAS HAMMITT.

Plaintiff-and Appellee,

-VE-

EMIL SANDEL,

Defendant-and Appellant.:

APPEAL FROM THE CIRCUIT COURT
OF LOGAN COUNTY.

320 I.A. 312

HONORABLY PRANK S. BYVAN.

Judge Presiding.

HAYES, P.J.:

of farm land in Loran County Illinois, rented to Emil Sandel by written lease, on August 28, 1933, demising the premises for one year from March first, 1934. Sandel continued to farm the premises from that date without the execution of another lease. On December 26, 1944, Sandel de served with a written notice from Mrs. Tager terminating his tenancy on March 1, 1945. Subsequently the farm de rented to Silas Hammitt, who filed the present action of forcible entry and detainer in a justice court in Loran County on March 13, 1945 when Sandel refused to vacate the premises. A judgment in favor of Hammitt in that Court was appealed to the Circuit Court of Logan County and upon a trial without a jury, judgment was again rendered for plaintiff. Defendant has appealed to this court.

Sandel does not contend that the notice served upon him did not conform to the statute setting up the procedure for terminating a tenancy from year to year, Ch. 80, Sec. 5, nor is there any doubt that subsequent to the expiration of

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the written lease Sandel occupied the premises as a tenent from year to year. Sandel's defense rests upon an alleged conversation which he testified took place between he and his wife and Mr. & Mrs. Wager in July, 1937 or 1938. In substance, Sandel testified that Mrs. Wager told him it was not necessary to ask for the farm each year as was his custom; that he replied that some agreement should be reached on the length of notice to be given should either of them desire a change; that he thought notice should be given in May or at least in July in order to terminate the tenancy the following March and that Mrs. Wager consented to this. Both Mr. & Mrs. Wager deny that the alleged conversation occurred. Evidence was introduced showing that Mrs. Wager was in Cuba in July 1937 and that Mrs. Wager was in Europe during the entire summer of 1939.

Hammitt contends that this oral agreement, if it was ever made. is void under the statute of frauds because it could not be performed within a year. The effectiveness of this argument depends on when the agreement was intended to take effect. Sandel testified: "I asked Mrs. Wager for the farm for the following year. I don't know the exact words, but in substance, she said I didn't have to ask for the farm every year, that I could go shead and farm just as I had been doing. I said we ought to have an understanding in case either one or the other wanted to make a change, and that we should have an agreement when notice should be given and \* that a tenant should know by May or at least by July the first \*\*. It is apparent from this that Sandel understood he was to have possession of the farm from March 1, 1938 (assuming the agreement was made in 1937) to March 1, 1939, and that thereafter Wrs. Wager agreed to give him a longer notice than the sixty days permitted

ටහ පවර ... වට සපර්වනහට ඉස්ව විසර 1850 වේ සටව ඉවලක් පැමුණිදී ්ම පර්වී Tour To a a st may may Bail sport of golds column and .การใช้สายเดือนการทำให้การให้เกาสายเลือนสายราชน์มค mine type that is not to ంటో బళ్ళుండారు. మేదముగా అంటాలు గారం ఈ మెగుకోరికి ఈ కృష్ణక్షార్ అగే మెదంటేఫ్ కృశాగాకాత్వమ అంకేవే A POST CALL FOR STORES TO LESS OF THE STORES OF A STORES WITH THE PROPERTY కా కి.మం. ఈ ఇద్దార్గుల్ని ఎక్కుక్కారు. ఈ 100 కి.మీ. కూడు కూడు కూడుకు కూడుకు కూడుకు కూడుకు కూడుకు కూడుకు కూడుకు or supera lavas At again through on the deal or some on the table of the property to the second of the second of - Percusur britisher The rest for the second section of the section of the second section of the s omen a file - a comment of the file

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by statute. This contract therefore could not take effect until after March 1, 1939 and thus could not be performed within a year from July, 1937. It is therefore void. Ill. Rev. Stat, Ch. 59, Sec. 1.

The judgment of the Circuit Court of Logen County is affirmed.

JUDGMENT AFFIRNED.

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## STATE OF ILLINOIS

APPELLATE COURT

February Term, A. D. 1946

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Gen. No. 9485

Agenda To. 5

CLARENCE E. YORDY,
Plaintiff-Appellee,

-vs-

THE FARMERS AUTOMOBILE INSURANCE)
ASSOCIATION, a Reciprocal
Insurance Exchange Organized and)
Existing Under the Statutes of )
the State of Illinois.

Defendant-Appellant. )

Appeal from

Circuit Court

Tazewell County.

320 L.A. 3122

Dady, J.

This suit was brought in the Circuit Court of Tazewell County by Clarence E. Yordy, who is the plaintiff-appellee, against The Farmers Automobile Insurance Association, to recover \$750.00 which Yordy contributed to the association toward its settlement of a claim by Walter Wittmer against Yordy for personal injuries, the association having settled such claim by paying Wittmer \$3500. on January 7, 1939.

On October 24, 1936, there was a motor vehicle accident in which Wittmer received severe injuries. Thereafter he brought suit in said Circuit Court against Yordy and L. E. Sutter to recover for such injuries. At the time of the accident Yordy carried accident insurance in such association on his automobile. The association, through its attorney and in behalf of Yordy, duly defended such suit of Wittmer vs. Yordy, et al. On May 16, 1938, in such suit a jury returned a verdict of guilty against Yordy

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and assessed Wittmer's damages at \$10,000. Thereafter the association duly filed in said suit a motion for a judgment for yordy notwithstanding the verdict, and an alternative motion for a new trial.

Both motions were duly argued on June 28, 1938, before and taken under advisement by the trial court. Such motions were pending and undisposed of when the association made such settlement.

So far as is material, the insurance policy provided that the association agreed "to insure and indemnify" Yordy "in accordance with Schedule Cne by reason of any claim or demand \* \* \* for which" Yordy "may be legally liable because of the ownership or use of an automobile \* \* \* if caused as follows: \* \* Claims Against The Assured \* \* \* on account of bodily injuries to \* \* \* one person, resulting from an accident of the automobile covered, \* \* \* the liability of the association shall not exceed Five Thousand Dollars \* \* \*. The association further agrees \* \* \* to defend any suit brought against" Yordy "to recover damages on account of such accidents \* \* \* where the judgment if rendered \* \* \* would be covered by this policy." Yordy "shall not without written consent of the attorney in fact" of the association "previously given, voluntarily assume or admit any liability or settle any claim or incur any expenses, except at his own costs. The association reserves the right to settle any claim or suit at any time at its own cost."

After the return of the verdict in the suit of Wittmer v. Yordy and before such settlement was made, settlement negotiations were had between Yordy, Ralph Dempsey, who was the attorney for the insurance association, and Louis Knoblock, who was the attorney for Wittmer. On January 4, 1939, in a conference in Knoblock's office in Peoria, at which Knoblock, Yordy and Dempsey were present, a figure of \$5500. in settlement was agreed upon. On January 4,

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1939, Yordy purchased two bank drafts payable to his own order, one for \$650. and one for \$100. Thereafter on January 4th Yordy indorsed and delivered the drafts to a Mr. Jack, as manager of the association, which were cashed by the association. On January 7, 1939, the association obtained a release from Wittmer and gave its check for \$3500. in such settlement.

Thereafter Yordy brought this suit against the association.

A jury returned a verdict for \$750. in favor of Yordy, on which the judgment appealed from was entered. The association brings this appeal.

The complaint, so far as is material charged that the defendant "made said settlement and stated to the plaintiff illegally, fraudulently, and deceitfully, by its statements, acts and conduct, required the plaintiff to pay the sum of \$750. toward said settlement, and that relying upon said statements and representations the plaintiff paid said sum to the defendant.

The only contentions of the association can be summarized as being, (1), that the trial court erred in denying the motion for judgment notwithstanding the verdict, and that therefore the judgment should be reversed, and (2), that, in the alternative, the judgment should be reversed and the cause remanded for a new trial on the ground that the verdict was against the manifest weight of the evidence.

Counsel for appellee say in their brief, "To simplify the issues here, we are willing to confine this argument to the question of whether or not the defendant fraudulently induced and required plaintiff to pay the \$750. to be used by it in settling the case well below the policy limits." On such question only

1939, Yordy purchased two bank drafts payable to his own order, one for \$850. and one for \$100. Thereafter on January 4th Yordy indereed and delivered the drafts to a Mr. Jack, as examples of the association, which were cashed by the association. In January 7, 1859, the association obtained a release from Wittmer and rave its check for \$3500. In and settlement.

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Counsel for appellee cay in their brief, "To cirplify the icence here, we are willing to confine this argument to the question of whether or not the defendent fraudulently induced and required plaintiff to pay the 1760, to be used by it in settling the case well below the policy limits."

On such question only

two witnesses testified for the plaintiff, viz, Yordy and Louis Knoblock. Knoblock was the attorney for Wittmer in both the trial and settlement of his case. On such question the only witnesses for the insurance association were Ralph Dempsey, P. A. D'Arcy, William Freitag, A. B. Ferdinand, and L. E. Robinson. Demrsey was general attorney for the association. D'Arcy was one of its attorneys. Dempsey and D'Arcy, as such attorneys, conducted the defense of the court proceedings in the Wittmer case. Dempsey conducted the negotiations relative to the settlement. Freitag was president and Robinson was a director of the association, and Ferdinand was in charge of its claim department.

Yordy testified that he was aged 31 years, had gone one year to high school and had always been a farmer; that shortly after the accident Dempsey told him the association would take care of everything and would protect him, and that he needed no attorney; that after the verdict Dempsey 'phoned him and told him there was a \$10,000 verdict against him; that on the same day he went to Dempsey's office in Pekin, Illinois; that bespeey then said, "clarence, we have a chance to settle this case for \$4,000. You have insurance for \$5,000 and you have a \$10,000 verdict, so you will owe one half of this and we will owe one-half. We are just like a team of horses hitched up together, you will have to pay your half and we will have to pay our half"; that he told Dempsey he couldn't raise \$2,000; that Dompsey then said, "We can take this case to a higher court and you will have to furnish a \$5,000 bond and we will have to furnish a \$5,000 bond. If you win you get your money back, and if you don't you lose your \$5,000 and we lose \$5,000"; that Dempsey asked him to come back the next day; that the next day

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he went to Dempsey's office; that there was present Fr. Ferdinand, Mr. Jack, Mr. Dempsey and Yordy; that Dempsey brought out again that they were like a team of horses hitched together and that they owed half and Yordy's obligation was to raise \$2,000 and they would pay their \$2,000 because of the verdict; that one of the other gentlemen said, "Why Clarence, that's the law, you have got to pay half, you owe half of that. We are willing to pay our half, but you owe your half and you will have to pay your half"; that Yordy then told them that he couldn't pay it, and they asked him to come back again; that the next day he went to Dempsey's office and saw Dempsey alone; that Dempsey said, "We have talked this matter over and decided to pay \$2500. You say you can't raise it and we are going to go out of our way. We only owe half. We are going to go out of our way to please you, and we will pay this \$2500 if you can raise \$1500"; that he told Dempsey he couldn't do it: that Dempsey said, "Well, if you want to go over to Mr. Knoblock's office we will go there, and if he comes down any that will be your saving"; that the next day they met at Enoblock's office and at that time Dempsey said to Enoblock, "We have agreed to pay \$2500 for Clarence in this case. He can't raise the money and he owes half and the company owes half, but they are willing to pay \$2500." That Yordy then asked Knoblock what was the least he would take and he said \$3500; that when he got home he 'phoned for Dempsey, but Dempsey was not in so he talked to Mr. Jack, the manager of the association; that he said to Wr. Jack, "I suppose you heard we can settle this for \$3500 and I owe \$1,000. Would you be willing to pay \$500 more if I could raise \$500. I would try to raise \$500"; that Jack said, "No, we have done more than we

he went to Lempsey's office; that there was present 'r. Berdinand. Mr. Jack, Mr. Demysey and Yordy; that Lempsey brought out again that they were like a team of horses hitched to them and that they owed maif and yorda's obligation was to below 2,000 one they would pay their as and because of the wordlos; clat one of the other gentleman said, "Thy Clamerce, that's the law, you have got to pay half, you one half of that. We are wi lim to may our nalf. but you owe your half and you will have to may your wiff", that Yordy then told them that he could's pay it, and they weken his te come back apains birat the vent way he was to be enter the cifical and caw dempesy atone; that the despectation of the season was based matter over and decided to year [2700. For the center of the far and we are going to go out of our may. We cally one a st. ma are gains to so out of our same to size or and set  $\mathbf{t}$   $\mathbf{v}$   $\mathbf{t}$   $\mathbf{t}$  and  $\mathbf{t}$ if you can raise (1860"; that h. icit hadpey in couldn't do it; that Cempeg said, "rell, if whe care of to twee to the brokens and the will be diere, and it is some own as the president of the world of ouving"; that the nest duy they mes at trobloch's effice and it that time Despeev said to inublock, "The name agreed to may herop for Clarence in this case. To cap't raine the tray and he case haif whi the company cree half, but they are willim to pay "FFCO." That Yordy then asked roblock what was the ceast he will take and he said \$3560; thet ther he do home he 'nhomed for lencker, but Dempsey was not in so he talked to ! r. Jack, the manuar of the assiciation; that he said to "re Jack, "I surpose ou heurd we can settle this for \$3500 and I owe 11,000. Would you be willing to may \$500 more if I could raise (500. I would try to raise \$500"; that Jack said, "No, we have done more than we

owe you, we have overpaid, we owed half and you owed half and we paid \$2500 just to be a good fellow with you, and you only owe \$1,000 and that's what you will have to raise."

Yordy testified that shortly after such last conversation he received from the association a letter dated December 31, 1938, signed "Secretary-Manager" which, so far as is material, reads as follows:

"Mr. Dempsey and I feel certain that we will be able to settle the case for \$3,500.00 and you should try to be prepared when you come in Tuesday to have as much as possible with you in the form of cashier's check or be in a position to write a check up to \$750.00. There seems to me to be some chance of disposing of this Tuesday if these details can be worked out.

Come to my office between 2:30 and 3:30 as you have already planned."

Yordy further testified that after receiving such letter he took the two drafts to Mr. Jack's office; that he laid the \$850.00 draft on the desk and Mr. Jack said, "That will never do, you will have to cover \$750.00; you have got to cover \$750.00. We have gone out of our way to please you. We have raised it again \$250.00 to please you. You ought to be tickled to death to get out of it"; that thereupon Yordy gave Jack the other draft for \$100.00. Yordy testified his reason for getting the two drafts was because he thought he might save \$100.00 out of the settlement. Yordy testified that he thereupon signed a typewritten statement prepared by Mr. Dempsey, dated January 5, 1939, which reads as follows:

"I wish to make the statement that I had a thorough explanation and am fully acquainted with the facts and circumstances relative to the verdict that was rendered against me in connection with the lawsuit brought by Mr. Wittmer and that I fully realize my obligation relative to the satisfaction of the verdict in whole or in part.

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I wish at this time to further state that in making the compromise settlement with Mr. Knoblock for \$3500.00 in which I am paying \$750.00 that I am recommending that the settlement be made; that it is my desire to dispose of the case at this figure and further that I consider the insurance Association's contribution of \$2750.00 to be more than their legal obligation and that I am completely satisfied and appreciative of this settlement."

Yordy further testified that he relied on the "various statements that he was liable for half of the settlement."

Knoblock, so far as is material, testified that during the settlement negotiations at knoblock's office Dempsey told Knoblock, "I have told Mr. Yordy all we have to do is match him dollar for dollar; that we are only liable for half of this. Regardless of that, however, we have agreed to go to \$2500 of the \$3500 you are demanding, and if this case is settled I have told Mr. Yordy that he would have to raise \$1,000.00"; that Dempsey said, "I have told Mr. Yordy that this verdict is for \$10,000.00, and that all we have to do is match him dollar for dollar, and that we have been willing to do, but Mr. Yordy states that he is having difficulty raising money, and in order to be fair about this we have agreed to go to \$2500.00."

Dempsey, so far as is material, testified that after the return of the verdict he told yordy he would file a motion for judgment notwithstanding the verdict and a motion for new trial, and if the same were denied judgment would be entered against Yordy for \$10,000.00 would and in that event the company, have to pay \$5,000.00 of the judgment and Yordy would have the responsibility of paying the other \$5,000.00, and that Yordy said, "Well, if you say so I will take care of that right away"; that he then said to Yordy, "No, you shouldn't do that, you have everything to gain and nothing to lose, except a

I wish at this title to further state that in maring the compromise settlement with Mr. /noblock for \$25500.00 in which I sat paying 1770.00 that I arrecommending that the settlement be made; that it my draine to licycle of the case at this figure and further that I consider the incurance ascociation's contribution of 2775.00 to be more then their legal chigatics and that I are completely actisfied and argradulation of this ecolorent.

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do that, you have everything to gain and nothing to lose, except a

very small amount for an appeal"; that if judgment was entered a bond would have to be given for something slightly in excess of \$10,000 for an appeal to the Appellate Court, and Yordy would have to provide \$5,000 of the bond and the association would provide the remainder; that he asked Yordy if there would be any difficulty in his providing for a surety on the bond, and Yordy said there would not be; that on December 30, 1938, Yordy came to his office; that Jack, Ferdinand, and D'Arcy were present; that he then told Yordy that Knoblock said he would consider \$4,000 in settlement; that he told Yordy that he believed Kboblock might come down to \$3500, and that since Yordy had a verdict of \$10,000 against him he thought that for every dollar the association paid Yordy should pay a like dollar, because if it went to a conclusion with the judgment sustained each would have to part with dollar for dollar, and that Yordy said he wanted the case settled, but wanted to think about it for a while; that at such conference nothing was said to the effect that Yordy was liable in law for one-half of any settlement that might be made; that on January 3, 1939, Yordy came to his office and talked with him and Mr. Jack, and wanted to know if the association wouldn't contribute more to get the case out of the way, and that after some discussion Jack told yordy the association would contribute \$2500; that the next day he and Yordy met at Knoblock's office and Knoblock then said he would take \$3500; that he and Yordy then walked outside of the building where Knoblock's office was located and Yordy told him he could raise \$750.00; that after that he had no further conversation with Yordy.

Dempsey further testified that in the conference of December 30th he suggested to Yordy that Yordy consult some other attorney, and that Yordy said he did not feel that was necessary.

very email abount for in appoint; that if judgment is an order as bond would have to be given for so beining griptly in marcas of 10,000 for an erusi to the Appellate court, and vorde well to provide 25,000 or the hund and the smecolability week thought wirthought were of higher and the Tolder beautiful that the respectively end read: the director to a cheef the many tenner of the vorseth in mound not 'e: shat in section W. Noth, to be the week like cities: that dook, ferdin md, and D'Arez were present; that a ten told rangemail, and the self of the condition of the condition of the or man arms that accepts a stellar to a state of prof on the state space, and that birds Villy was a declarate willy state and the contract of thought igst for every wolks; bis cashedation suid Times, i. I a libe doliar, bloaded if i see use same deite alt. The transmitte sustings on that not much a the other or a constitute of the sustainable Fordy said he wonton the cars well-and but I moved to topy make est or while the property porterior from the dust selfer a row di erfact that Yorky was included have ordehalf of any a tola mas offer an exception. The first state of the s office and balked with his and the land, and a more of them if the association wealth to con mibute more to be case out of the way, and that after some almouseior lace nold yerry has esectation would contribute satict the next day he and yorky art at Anthlock's office and Anobleck than said he would take \$2500; that he and yordy then walked outsite of the building where anothera'r office was located and yordy told min he sould rules (750.0%; that after that he had no fluther orgyerasticm att: "endy.

Lempsey further testified that in the conference of recember 30th he suggested to fordy that Yordy consult rome other atterney, and that Yordy said he did not feel that was necessary.

D'Arcy testified that in the conference of December 30th Dempsey suggested that Yordy consult some independent counsel, and Yordy said he didn't think he needed any counsel; that in such conference no one said to Yordy, "You are legally liable for one-half of the settlement in this case."

Ferdinand testified that at such conference Dempsey suggested that Yordy consult other counsel and Yordy said he was satisfied with the representation of Mr. Dempsey.

Freitag testified that in January, 1939, Yordy told him he had a chance to settle hie case for \$3500; that the association had agreed to pay \$2500 and he to pay \$1,000, but that he would like to have the company go to \$2750 and he pay \$750.

Robinson testified that in January, 1939, Yordy told him that the case could be settled for \$3500 and that he was anxious to have it settled, and that the association had agreed to pay up to \$2500 and wanted Robinson to agree that the company would pay \$2750, and said that if the association would pay \$2750 that would leave \$750 for him to pay and he would be very much pleased.

In rebuttal Yordy testified that he did not at any time tell Dempsey that if judgment for \$10,000 was entered and became final he would pay \$5,000; denied that Dempsey ever suggested that he consult other counsel; denied that he had the conversation with Freitag that the latter testified to, and denied that he had the conversation with Robinson that the latter testified to.

We consider the foregoing to be a fair statement of all of the material evidence. AREMEXEXEMPSEUEXEMPREEMEMENTAREMENT AND AREMENT AND AREMED AND AREME Dempsey suggested that in the conference of Locether Scan Dempsey auggested that Fordy consult some independent ocursel, and Yordy said he didn't think he needed any coursel; that in much conference no one said to Yordy, "You are legally liable for one half of the settlement in this case."

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Freitag testified that in January, 1239, Yordy toli his he bad a chance to settle his case for \$5500; that the association has agreed to pay (2500 and he to pay (1,000, but that he would like to have the company go to \$2700 and he pay 1770.

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 In passing on a motion for judgment notwithstanding the verdict the court is required to assume that the evidence favorable to the plaintiff is true, and if there is any evidence fairly tending to prove the complaint, the motion must be denied, even though the court is of the opinion that a verdict for the plaintiff, if given, must be set aside as against the preponderance of the evidence. (Synwolt v. Klank, 296 Ill.App. 79; Hunter v. Troup, 315 Ill. 293; Osborn v. Leuffgen, 312 Ill.App. 251.)

Where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be supported by a lesser number of witnesses, a court of review will not set it aside as being against the manifest weight of the evidence. (Carney v. Sheedy, 295 Ill. 78; Summers v. Hendricks, 300 Ill.App. 498.)

The question of whether the witnesses for the plaintiff or the witnesses for the defendant were telling the truth was, of course, a question of fact for the jury. The jury evidently believed the testimony of the witnesses for the plaintiff.

Assuming the testimony of plaintiff's witnesses to be true, we believe the jury was justified in finding, in effect, that the defendant, by fraud and deceit, caused the plaintiff to believe that he had to pay the \$750.00 towards such settlement, and that acting on such belief the plaintiff paid and the defendant thereby obtained such \$750.00.

It is our opinion that the evidence fairly tended to prove the material averments of the complaint, and it is our opinion that the verdict was not contrary to the manifest weight of the evidence.

The trial court therefore did not err in entering the judgment appealed from. Such judgment is affirmed.

Affirmed.

In passing on a motion for judgment netwitherending the verdict the court is required to assure that the syidence favorable to the piaintiff is time, and if there is any evidence favorable tending to prove the complaint, the motion must be desire, even though the court is of the epinion that a vertice for the ristorial for the paintiff, if given, must be set aside as against the messcularions of the evidence. (Sympolt v. Alank, ODS Ill.Agr. Tot during v. Tenup, 516 Ill. 205; Octorn v. Leuffren, 517 Ill.Agr. Tot.

Where there is a contrariety of evisors and rise continuity by fair and reasonable intendent will emblorize the ventet, even though it must be surnorbed by a length number of stancese, a court of review will not set it exist as heing assists, the manifest weight of the evidence. (Unmay v. Shepay, 1987 11).

The question of thether the rithserse for the claiming or the witnesses for the defendant were telling the course, a nuestion of fact for the jury. The jury axisently believed the tentimenty of the attrement for the phintiff.

Assuming the testimenty of plaintiff'r witnesses to be true, we believe the jury was justified in finding, in effect, that the defendant, by fraud and isself, reused the claiminf to believe that he had to pay the 2750. O coverds such settlement, and that acting on such belief the plaintiff raid and the defendant thurshy obtained such \$750.00.

It is our opinion that the ovidence fairly tended to prove the meterial averance of the complaint, and it is our orinion, that the verdict was not contrary to the manifest weight of the evidence;

The trial court therefore did not err in entering the judgment appealed from. Such judgment is affirmed.

Abstract

## STATE OF ILLINOIS

APPELLATE COURT

February Term, A. D. 1946

Gen. No. 9489

Agenda No. 8

John M. Furr and Amanda M. Furr,
Plaintiffs - Appellants,

Shelby Loan & Trust Co., an Illinois Corporation of Shelbyville, Illinois, et al., Defendants - Appellees.

Appeal from the

Circuit Court of

Shelby County.

320 I.A. 313

Dady, J.

This is a proceeding in chancery by which the plaintiffs,

John M. Furr and Amanda M. Furr, seek the cancellation of a mortgage

and notes thereby secured upon payment thereof by the plaintiffs,

and the cancellation and removal of record of two deeds. The chancellor

entered a decree dismissing the complaint for want of equity. Plaintiffs

appeal.

On February 25, 1924, Arthur C. Wilson and Nancy J. Wilson, his wife, were indebted to the defendant Shelby Loan & Trust Company, hereafter referred to as "Trust Company," in the sum of \$18,000.00 on ten promissory notes of that date, due five years after date, bearing interest at 6% per annum, payable semi-annually. To secure payment thereof Wilson and wife on said date executed and delivered to the Trust Company a first mortgage on 226.64 acres of farm land. Thereafter the Trust Company, in due course, and apparently prior to maturity thereof, sold all of the promissory notes to certain of the defendants herein.

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On March 1, 1929, an extension agreement was entered into between the mortgagors and the Trust Company whereby payment of the indebtedness was extended to March 1, 1934. The interest due March 1, 1930, and thereafter to and including September 1, 1931, was not paid. Prior to September 9, 1931, the premises were advertised for sale for delinquent taxes due in 1931. On September 9, 1931, there was due \$19,872.88 as principal and interest on the indebtedness, and the unpaid taxes amounted to \$346.88. The uncontradicted proof is that the fair cash market value of the premises in question on September 9, 1931, was not to exceed \$17,000.

On September 9, 1931, L. C. Westervelt, who was then a Trust
Officer of the Trust Company, obtained from the mortgagors a warranty
deed by which the whole of said real estate was conveyed to J. C.
Westervelt. The stated consideration was one dollar. J. C. Westervelt
was the then president of the Trust Company and was the father of
L. C. Westervelt. The warranty deed contained a clause stating
that the deed was subject to taxes then due and to the mortgage
heretofore referred to, and contained a reservation to the grantors
of the right of possession of the whole of the premises until
March 1, 1932. The deed was filed for record on September 10, 1931.
J. C. Westervelt, the grantee, was not present when the deed was
made, had had no conversation with the grantors regarding the deed,
and neither he nor any one in his behalf paid anything to the
grantors in consideration of the execution of the deed.

On the following day, that is on September 10, 1931, J. C. Westervelt and wife executed and delivered to the Trust Company a quit claim deed conveying said real estate to the Trust Company. Nothing was paid by the Trust Company to J. C. Westervelt for the

On March 1, 1989, as extension squences was entered into between the nortgagors and the Trust Company whereby payment of the interest duo indebteiness was extended to March 1, 1984. The interest duo March 1, 1980, and thereafter to and including deficites 1, 1981, was not paid. Frior to September 6, 1981, the premises were advertised for make for delinguent taxes has in 1981. On September 9, 1981, there was due fir, 670.83 as reincipal and interest on the inightedness, and the uspeld taxes whomeved to bade, set the uncontradicted proof is that the fair oast mental value of the premises in question on deptember 9, 1981, was not to exceed \$17,000. On September 9, 1981, ). I. Testerveit, who was then a Trust on September 9, 1981, ). I. Testerveit, who was then a Trust

Officer of the Trust dompany, obtained from the serice on warranty deed by which the whole of said real actate was conveyed to J. d. destarvalt was the then president of the Trust Company and used the father of 1.0. Lestarvalt L. G. Westervelt. The stated the Trust Company and used the father of that the deed real subject to taxes then due and to the particular attact the referred to, and contained a reservation to the warranter haretefore referred to, and contained a reservation to the granters of the right of possession of the whole of the remises until less. The deed was filed for record on Repterber 10, 1031.

J. G. Westervelt, the grantes, was not present when the deed was and neither the nor any one in his tehalf paid engine the deed, and neither to consideration of the execution of the Accident to the

On the following day, that is on September 13, 1351, J. G. Wostervelt and vife executed and delivered to the Trust Company and colain deed deriveying anid real estate to the Trust Company. Nothing was paid by the Trust Company to J. C. Testervelt for the

execution of this deed, and it was held by the Trust Company without being recorded from September 10, 1931, until July 15, 1936, when it was recorded.

Such mortgage is the mortgage sought to be redeemed from, and said warranty and quit claim deed are the two deeds sought to be cancelled in this proceeding.

Arthur C. Wilson died intestate in 1938, and his widow died in 1939. No administration was had on his estate. He left surviving as his only heirs his widow and six children, viz, Grace Wilson, Luther Wilson, Walter Wilson, Amanda M. Furr (who is one of the plaintiffs and the wife of the co-plaintiff John Furr), Clarence Wilson and Howard Wilson. Thereafter Grace Wilson died unmarried and intestate. Thereafter and on January 12, 1944, Luther Wilson, Walter Wilson, Clarence Wilson and Howard Wilson, for the consideration of four dollars, quit-claimed all interest in said premises to the plaintiffs. On July 11, 1944, plaintiffs started this suit.

on September 11, 1931, a lease dated September 9, 1931, was entered into by the Trust Company as lessor and John M. Furr as lessee, whereby John M. Furr rented from the Trust Company the south 118.64 acres of said real estate from March 1, 1932, to February 28, 1933. This lease contained a provision that it was subject to cancellation in case of a bonafide sale by the lessor before November 1, 1931, in which case \$500 should be paid to the lessee. A second lease was entered into with the Trust Company by L. C. Westervelt, trust officer, and John M. Furr on August 18, 1932, whereby such 118.64 acres were leased to Furr from March 1, 1933, to February 28, 1934. On the back of the second lease appears the following indorsement, dated August 18, 1932, and

exoution of this feet, and it was held by the Trust Josephous being recorded from Jephenber 10, 1931, until July 's, 1934, when it was recorded.

Such mortgage is the sortgage wought to be reduced from, and eald servanty and guit claim doed are the two doeds cought to be campalled in this proceeding.

Arthur 0. Vilean Aisa intertate in 1979, and his since died in 1979. No administration was had an his schute. No lest coursiving as his only heirs his widow and oir o'didren, via, Grane Vileon, linther Vilson, Valter Vilson, Asumia k. Pure (who is one o' this plaintiffs and the wife of the oc-plaintiff John Evre), Clarence Wilson and Howard Wilson. Thereofter orses without died unsurried and intestate. Thereofter and on Jernary 19, 1966, Tuther Milson, Clarence Wilson and Neward Vilson, for the consideration of four follors, suff-oisimed all intertaces in ould remise to the plaintiffs. On July 11, 1944, Jistriffs shared this suff.

On deptember 11, 1971, a lease inter Serverber of 1981, was entered into by the Truct Sempany no issuer out found. Form as lease, whereby John F. Furr rested from the Trust Semany the couth 118.64 seres of swid real catate from March I. 1987, he February ES, 1983. This lease tentained a provision that it was subject to candellation in case of a boratin sclopy the leasest before nowember 1, 1881, in which case two about he read to the leases. A second lease was entered into with the Trust Scapuly by I. C. Westervelt, trust officer, and John M. Furr on August 18, 1988, whereby such 118.64 seres were leased to Furr from March 1, 1883, to February ES, 1984. On the back of the second lease appears the following inderence, dated August 18, 1983, and

signed by Arthur C. Wilson: "I hereby acknowledge that I am leasing the building and six acres south of the same as described in the within lease, as a sub-tenant from John M. Furr and hold it only as such sub-tenant and in no other right, said John M. Furr being the tenant of the Shelby Loan & Trust Company, Agent." Furr duly paid to the Trust Company all rents due under such two leases.

On October 22, 1931, the Trust Company leased the north 108 acres of said farm to Claude Small for the period beginning March 1, 1932, and ending February 28, 1933, and thereafter the Trust Company collected the rents due under such lease.

Ever since the expiration of such leases to Furr and Small, the Trust Company, as lessor, has leased the whole of such farm and collected all rents therefrom. After paying taxes, insurance and upkeep, the Trust Company has from time to time paid all of the net income, first to the note holders and later to the holders of the aliquot part certificates hereafter referred to.

On September 9, 1931, the plaintiffs lived on an adjoining farm. Since such date neither of the plaintiffs has lived on the Wilson farm. After September 9, 1931, the mortgagors continued to live in the farm house on the Wilson farm until Narch 1, 1934, when they moved from the farm and did not thereafter live thereon, but continued to live in the neighborhood until their deaths.

On April 8, 1937, the note holders surrendered such notes to the Trust Company and the company issued to each note holder "an aliquot part certificate" evidencing his ownership of a prorata interest in said farm. The total of the certificates covered all interest in the Wilson farm. Each certificate recited that the owner had deposited his note with the company for cancellation and surrender, that it was understood title "has" been placed in

signed by Arthur 9. Wilson: "I hereby to browledge that I am leasing the building and aix sures as associated in the within lease, as a sub-tenant from John '. Turn and held in only as auch sub-tenant and in no other right, and donn?. Turn being the tenant of the Shalloy Loan I Trust durpany, ident," there duly paid to the Trust loupany all rents has an in the sea.

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the company by the mortgagor in satisfaction of the mortgage debt, that the company should hold title for the benefit of the parties interested, that the company might manage and rent the premises, and from the proceeds pay the taxes and expenses, the overplus to be distributed among the parties interested; that any offer of purchase should be submitted to the certificate holders before a sale was made, that upon a sale the company should pay the proceeds, less expenses, to the certificate holders, that if the sale price was more than the mortgage indebtedness, the excess should be paid to such certificate holders, and that the management of the farm might be removed from the Trust Company on request by two thirds of the parties interested.

The mortgage at all times has been and is held by the Trust

Company and no release thereof has been executed. The notes were
never returned to the mortgagors, and ever since the issuance of
such aliquot part certificates the Trust Company has held such notes.

After the execution of the warranty deed on September 9, 1931, neither Arthur C. Wilson, nor any one claiming under him, asserted or attempted to assert that said mortgage indebtedness was not satisfied by the giving of said warranty deed until about the time plaintiffs obtained such quit-claim deed in January, 1944, from the Wilson heirs.

The only witnesses who testified as to the giving or obtaining of the warranty deed were John M. Furr and Lula Wilson (she being a daughter-in-law of the mortgagors), who testified for the plaintiffs, and L. C. Westervelt who testified for the defendants.

John M. Furr testified that on September 9, 1931, Arthur G. Wilson told him that L. G. Westervelt had been out that afternoon and wanted a deed for the place, and wanted the witness to farm the land, and was coming back that evening, and Mr. Wilson asked

the company by the morteager in muticisation of the mortrary debty that the company about this for the benefit of the marties interested, that the occasing right manage and from the members, and from the mecaning may the taxes and errorses, the overwing to be distributed among the marties interested; that any offer of purchase should be suitaited to the cartificate bould are before a sale was made, that when a sale the company about may the proceeds, less experies, to the certificate fedders, that if the sale price was more than the certificate fedders, that if the sale price was more than the certificate fedders, the restrant finate follows, that the should be paid to such eachillouts induced and the renagement the the rangement the the rangement.

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John W. Furr testified that on September 9, 1981; Arthur G. Wilson teld him that L. G. Westervelt had been out that aftermoon and wanted a deed for the place, and wanted the witness to farm the land, and was coming back that evening, and Fr. Wilson asked

the witness to come up; that later that evening he came to the farm house and there found Mr. and Mrs. Wilson, Luther Wilson, L. C. Westervelt, Link Ward and Jake Wendling; that Westervelt and Arthur C. Wilson then went in the farm house and the witness talked on the porch with Mr. Ward, while Wendling sat in an automobile; that he was then called into the house by Westervelt, and there were then in the room Mr. Wilson, Ars. Wilson and Westervelt; that Westervelt said to the witness, "I want the folks to sign a deed to the place": that the witness said, "What for?"; that Westervelt said, "They are pretty much involved and anybody could throw a judgment against them, and it would throw them in bad shape and the bank too, that this was only additional security to protect the bank in case a judgment should be entered against the folks"; that the witness said, "I don't know, what about it?": that Arthur C. Wilson said, "I don't know whether I ought to do this or not": that Westervelt said that the bank had been good to Mr. Wilson and Mr. Wilson ought to be good too and protect the bank, and said the folks could continue to live right there and they would rent the land to the witness; that the witness said, "If that's just additional security I don't see no harm about the deed"; that Mrs. Arthur C. Wilson began to cry and went into the kitchen; that Westervelt said he thought the thing to do was to leave the mortgage in the Trust Company's hands until the matter was settled up: that he thought the thing to do was to sell the land and all over the mortgage would go to Arthur C. Wilson; that Westervelt said the deed ran to J. C. Westervelt because the latter was president of the Trust Company: that Westervelt asked the witness if he would not go out and talk to Mrs. Wilson and ask her to come back in, and he did go out and talk to Mrs. Wilson and she then came into the room

the witness to come up; that loter that evenier he came to the farm house and there found ir. and Mrs. Wilson, Luther Wiscon, F. C. world's bis dievreded" tend spalifyed edet face brad daid .dievredeew C. Wilson them work in the fare bouse and the witness talked porch with Mr. Mard: while Conditor set in an entorchilo; that he was then called into the house by Wostervell, and theme were then in the room Mr. Vilson, Mrc. Vilson and Vestervolt: that Jestervolt said to the witmens, "I want the "olfs to airs a deed to the place": that the witness and. "That for?"; that bestervelt enid. "They are preaty much involved and orpholy could thopy a judgment and hat then, and it would throw them in had seen and the head that think thin was only additional accurity to everet the bonk in fore a Ridmost chould be emissed against the follow; that the oftenes said. This out t hoov, what about 197: that Arthur O. Wilson soil." I for't irrow whather hast thuse and that the slavengers sade : "don to mids on od diamo I been cood to Mr. Tilson and TW. Silson ordit to be reed the and protests the end out the fall the fall condinue to live pinking cheroids and their standard of the land the threat the year black and said. "If ther's fust edditional security i lon't see no harm about the deed"; that Tra. Arthur C. "Lisen beans to ary and root into the kitohon; that Teatervelt unid he thought the thing to do was to leave the mortgage in the Trust Company's hands until the malter was ber that he thought the thing to to see to see the land tioves that corterne would so he thur C. Wilson: that Peter tio eald the deed ran to J. J. Westervelt because the latter was president of the Trust Company: that Westervelt saked the without if he would not so out and talk to Mrs. Wilson and sak her to come back in, and he did so out and talk to Mrs. Wilson and she then came into the room

with Lula Wilson; that Westervelt then went ahead to explain again what the deed was for, practically the same thing, that they wanted a deed for their own protection; that Mrs. Wilson asked Lula and the witness what they thought about 1t, and they told her that she could go ahead and sign it and could continue to live right there: that the deed was then executed, and Jake Wendling, who was a Notary Public, then came into the house and took the acknowledgment to the deed; that after the deed was executed and given to Westervelt he said that he was going to St. Louis the next day and would not be in town in time to get the deed recorded, and asked them not to say anything to outsiders about the case, if anybody gets hold of it they are liable to get a judgment against them and knock it out for fifteen months; that the witness asked Westervelt if the mortgage and notes would be delivered out there, and Westervelt said, no, he thought the thing to do was to leave it right there at the bank until it was settled up in case of a sale. When the witness was asked why he asked Westervelt if the notes and mortgage would be sent to Mr. Wilson if they were not paid, his answer was, "Well, I was wondering if he was going to do it - if that was the way he was going to do it."

Lula Wilson testified that earlier in the evening "the folks had told us that Mr. Westervelt wanted them to sign a deed for their place to the bank," that after Westervelt came the witness was in the kitchen when Mrs. Wilson came in crying; that later Mrs. Wilson and the witness went into the room where the deed was later executed; that Westervelt then asked Mrs. Wilson to sign the deed and said, "Mrs. Wilson, I think you should sign the deed, it is as much for your good as for the bank," and said, "Mr. Wilson will sign the deed

with Mula Wilson: that Westervelt then want shoot to explana acute what the deed was for, practically the ware thing, blus they wanted has alm. befor mostly and sads inclosions and aleds not beeb a the witness what they thought about it, and they told her thet constant suit evil of control bluce but the stanta break se bluce ede that the deel was tion executed. Int Take Hendling, who ras a Metery Fublic, then came into the bouse and rock the scirculations to the of flevrotes of mevia has becovers and beck end totte tent then anid that he was roing to St. Louis the next day and replid not be in town in time to sat the ford recorded, and arked then not to any environs to outsiders about the state, if anyhody rate hold of if they are itable to set a judgment against than and knock it out for fifteen months; that the witness called Westervell if the cortexes and notes would be delivered out there, and Westervelt said, no. be thought the thing to do was to leave it right there at the bank with it was settled up in case of a sale. When the witness was asked why he saked Westervelt if the moter and northern vould be sent to Mr. Wilson if they were not paid, his arewer went, "Well, I was wondering if he was going to do it into the was the was going to do it."

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if you will"; that Mrs. Wilson said, "John, what do you think I should do?" and Mr. Wilson said, "If that's the way it is I can't see any harm in your signing the deed;" that Westervelt said they were not taking their home from them, it was just making it safer for the bank by them signing the deed, and that they still could stay on the place and live there as their home, and Mrs. Wilson said, "If that's the way you \*\*Max\*\* think I should do I will sign it," and the deed was then executed. She testified that nothing was said in her presence about other creditors or judgments.

I. C. Westervelt testified that at the time of the execution of the deed he was an officer of the Trust Company, that shortly before the execution of such deed he had several conversations with Arthur C. Wilson in the bank about the state of the mortgage iniebtedness, the unpaid taxes and interest, and that the value of the land was less than the mortgage debt and interest, and that he asked Wilson to make a deed in satisfaction of the indebtedness: that shortly after noon on September 9, 1931, he went to the Wilson home and talked to Arthur C. Wilson and his wife about the matter; that he then told Mr. Wilson the situation so far as the amount of the interest that was past due, and the taxes would have to be paid, and the bank would have to do something about it and again asked Wilson to make a deed in satisfaction of the debt to avoid a foreclosure, and told Wilson if they gave the bank a deed to the property that would end their obligation to the bank on the mortgage; that Wilson asked permission to live on the farm until the then crops had matured, and he told Wilson he would incorporate that in the deed: that Er. Wilson then said he would sign a deed, and the witness then went back to the bank and had the deed prepared and took it out that evening, and that after some little discussion in the

if you will, thit dre. This meats, "John, who to row think I should do?" and br. Wilson sail, "If thetis the ray it is I can't see any harm in your signing the feed;" that "esterouslt early they were not taking their home from them, it was just mading it suffer for the bank by them airning the deed, wro that they still enold etay on the place and live there as their home, and from add, "If that's the way you xxxxxx think I should be will sign it;" and the deed was then executed. She havel he will sign it;" and the deed was then executed. She havel that rothing was raid the presence short other analitions or "who were."

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farm house the deed was executed.

Westervelt denied he told the Wilsons that they were pretty much involved and if a judgment was taken against them it would throw them in bad shape and the bank too; denied he told the Wilsons that the deed was only additional security for the bank; denied he said the mortgagors could stay right on the farm just as they had before, but said he did tell them that the Trust Company would be glad to rent the south part of the farm to John M. Furr and if Furr cared to let the Wilsons continue to live in the house during the term of the lease that was no affair of the Trust Company: denied he said he thought the thing to do was to just leave the mortgage in the Trust Company's hands until the matter was settled up; denied he said he thought the thing to do was to sell the land and all over what the mortgage debt took would be turned over to Mr. Wilson; denied he said they were not taking the Wilson's house from them, and denied he said they were just making things safe for the bank and Mr. and Mrs. Wilson could still stay there as their home.

Westervelt's explanation as to the delay in issuing the aliquot part certificates was that the Trust Company had difficulty in getting the note holders to meet and agree on a plan for the operation and sale of the farm, and that such agreement was not reached until about 1937.

John M. Furr testified that on September 11, 1931, he went to the Trust Company and told L. C. Westervelt it looked to him that it would be better for the Trust Company togive the Wilsons the farm house and eight acres of land and "straighten the thing up right now," and that Westervelt said he would see. Westervelt testified he had no recollection of any such conversation.

farm house the deed was executed.

ridery error that the fill the filters that they the fretty much involved and if a judgment was taken against these it would throw them in bal abaye and the bank too; deried he told the Wilsons that the deel was only calificual security for the bank; daut and end no limin yade bluce evosend on odd bise od boireb es they had before, but said be ill tell then that the Trust Correct would be aled to sent the enuth name of the ferm to low ". Fire and if Furr cared to let the Wilsons combined to live in the house during the term of the lawes then was no wifair of the Trust Commany: denied he cald he thought the thing to le sur to that leave the mortemen in the Trust Company's hards tuit? the matter and celtical up. denied has said he thought the thing to do was to said the lord more fermy and blook wood for compared out the reve ile has to Mr. Wilean; denied he well they rave not taking alle of tron's house from them, and devied no sabe tasy vore just raking things aufe for the bank and hr. and hre. Olly on outh atthe 'av burne sa their home.

Westerveit's explanation at to the felar in insulae the all pot part certificates was that the frust Coupany bal Hifficulty in getting the note holiers to west and parts on a plan for the operation and sale of the farm, and that such agraement was not remained until about 1957.

John N. Furn testified that on September II, 1971, he went to the Trust Sempany and told L. J. Westervelt it looked to him that it would be better for the Trust Sempany togive the Wilsons the farm house and edght sores of law and "struighten the thing wy right now," and that Westervelt said he would see. Westervelt testified he had no recollection of any work conversation.

Where a mortgages takes a conveyance of the mortgaged premises from the mortgagers, but retains the mortgage and the note thereby secured, in the absence of proof showing a contrary intention there will be no merger or extinguishment of the mortgage, but the intention of the parties at the time of the execution of the deed is the controlling element. (Dunphy v. Riddle, 86 III. 22.) The question whether a deed absolute in form is in fact a mortgage depends upon the intention of the parties in that regard at the time of its execution. Parol testimony is admissable to show what was the intention, and every fact tending to illustrate the purpose and intent of the parties is receivable as evidence. (Totton v. Totten, 294 III. 70.)

The testimony of the two witnesses for the plaintiffs as to what was said and done at the time of the execution of the deed materially conflicts with the testimony of the one witness for the defendants. The trial court saw and heard all of such witnesses testify, and of course, was in a better position than are we to determine the oredibility of such witnesses. The trial judge evidently believed the testimony of the one witness for the defendants that in the conversation of September 9, 1931, he asked Arthur C. Wilson to make a deed in satisfaction of the indebtedness, and that he told Mr. Wilson such a deed would end his obligation to the bank, that Wilson asked and was given permission to remain on the farm until the current crops had matured. We cannot say that the trial judge was not justified in believing such testimony. The testimony of such witness for the defense to the effect that it was the understanding and intention of the parties that the warranty deed was given, not as additional security, but in satisfaction of the mortgage indebtedness, is corroborated by the fact that the

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The teutinony of the re. vigraday. For the river interesting a to .... The bound of a post of the relative and the sould not a sect first like asset comflicts with the hystropy of the res direct for the time to the Entropy and a control of the control of the entropy and the desired and the second of the control of the contro of courses, was in a believe that the first three are the line and the orodibiliting of Lucia villenders. It is the property of the order of the temperature of the ede virtuals the land with it is in the cally a dood in said what he will be able to be with the to the terminal in 🔥 kon -evi y mojechin, wid ime "lum" imeb 🗸 deum dunid" 🗝 🛣 - โ. วัด : พระวัน เป. พย สมมาย คน หร้าง ได้มามา สมทาย ค.ศ. โดน ให้เรื่อง ยองโม้ใ the ourrent arone but there are never as accorde as and the training the first of was not juntified in believelne noch testimony. The "noti may of such witness for the defense to the offect that it and the reference of the same of the carties that the arbitrature of was given, not no additional security, but in satirfaction of the morphage inichtedness, is appronounced by the flot that the

uncontradicted evidence shows that at the time of the execution of the deed the then value of the premises was less than the amount of the indebtedness, by the fact that the deed limited the right of possession of the grantors to March 1, 1939, the fact that on August 18, 1932, Arthur C. Wilson signed the important on the Furr lease which stated that he, as a sub-tenant, was then leasing six acres of the farm from John M. Furr, and in no other right, the fact that on March 1, 1954, When the last Furr lease had terminated, Arthur C. Wilson and wife moved away from the farm and never thereafter claimed or asserted any interest therein, the fact that Arthur C. Wilson did not at any time after the execution of the varranty doed offer or attempt to pay the indebtedness or make any intuity concerning the same, and the fact that after September 0, 1931, the Trust Company made no attempt or request for the payment of the indebtodness, but immediately took and continuously retained the exclusive and undisputed possession of the Whole of the premises and during such time exercised open and unquestioned rights of ownership.

It is our opinion that the trial court did not err in entering the decree in question. Therefore such decree is affirmed.

Affirmed.

ancontrol evidence are the termine the sense of the sense of the sense are the sense of the sens of the deed who then Value of the profised out leve back the amount of the indeptedress, by the fact that the last in Link if the items of possession of the enumbers to land to the fact trut or treatt 18, jagg, Arthur 1. "I's an impai has interstant or the term laws which stated time be, se a mid-trant, are ales leading the acres of the farm from Wolfe M. worry and in my colors right; He of the teat on tarch I, 1774, then the last filer leads one that instead, wellar tedformed they are the tree the first or the few and rever the mostiver. olatered or renorted any interest therear. We need the to Arthur i. Deni vicennev and le moldeon y . It have a whit you to too bib ownil the ease, and the Mice Whit a territor while ", 1944, the land territor draft . near the first set the deprenant seed that the draft and draft and a chief immodiately those and constitutionally recommend the most view and from marker to tortrant will be such and to make each besuggiften . Mayor to the other in them all uses from mega herioters emit one frag are the fort first for the fact of the forth and the or of the

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Abstract

## STATE OF ILLINOIS APPELLATE COURT FEBRUARY TERM, A. D. 1946



Gen. No. 9492

Agenda No. 10

JOHN E. NEAL, )
Plaintiff-Appellant, )
Vs. )

OPAL FERN NEAL, )
Defendant-Appellee. )

Appeal from the
Circuit Court of
Sangamon County.

Wheat, J.

328 I.A. 314

This is an action for divorce filed by the husband, appellant, against the wife, appelle, charging adultery. The cause was heard by the Circuit Court of Sangamon County, without a jury, after which the Court dismissed the cause for want of equity.

The sole question presented is as to whether or not the finding of the trial judge was against the manifest weight of the evidence.

The plaintiff, John E. Neal, testified to the marriage at St. Charles, Missouri, in April, 1943; that he left for the Navy from Springfield, Illinois, on September 17, 1943, and went to Great Lakes, Illinois; that he was stationed at Memphis, Tennessee, for seventeen months; that his prior suspicions of his wife's conduct were corroborated when he returned to Springfield, on leave, in February, 1945; that while in Memphis, his wife stayed out all night on several occasions; that he had not lived with his wife since he learned of certain things while home on leave in January and February, 1945.

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Chussie Scott, testifying for the plaintiff, said that she had seen defendant in the tavern where witness was employed, in December, 1943, about 10 P.M., drinking beer, in the company of one Carl Radford; that at another tavern, defendant was drinking beer with plaintiff's brother, Harry Neal, no date being specified; that on each occasion, all she saw them do was to sit there drinking beer. On redirect examination, she stated that when she saw defendant in the company of "this man", they came in by themselves and left by themselves.

Harry Neal, brother of plaintiff, testified that in answer to a question by plaintiff in February, 1945, he replied that he had been with defendant. Witness then testified that he had been in the company of Mrs. Neal, the defendant, a lot of times; that the first time he was alone with her was in May, 1943, on a trip to Jacksonville and Carlinville; that later, they drank beer until eight-thirty or nine o'clock and started back to Springfield; that at Mrs. Neal's request, he stopped the car and had intimate relations with her; that several weeks later he had sexual relations with her in a trailer where she was living on Clear Lake Avenue; that later, on another occasion in the trailer, the act was repeated; that the last time he had sexual relations with her was in 1943, before she joined her husband in Memphis. On cross examination, he stated that he did not tell his brother about this matter until 1945 because "I figured that was his business, not my business; I wasn't telling nothing." Q. "Wouldn't that have been just as applicable before?" A. "No." Q. "Why didn't you tell him before?" "I will tell you why. Do you want me to tell you?" Q. A. "I went out one night and I had \$67.00 in my pocket and she took all my dough and the next morning she gave me my dough and I stuck it in my pocket and when I got home I had \$54.00. She takes ten dollars of my dough like that. " He further stated that on one

L. D. 1 -: E F. T. · ' ' ' ' ' ' ' - . - E. g - 1; r. y - 1- 1-4 7 m S (0 10 1) THE PROPERTY OF THE PROPERTY. occasion in the trailer, in June, 1943, defendant's mother was there; that Mrs. Neal came to his bed and told him not to worry because she had given her mother two sleeping pills; that he told plaintiff the whole story in February, 1945, because "Any woman that would switch on anybody and take a ten dollar bill from me, I will tell him everything." Q. "You are more concerned about the loss of a ten dollar bill than you are about anything else?" A. "Yes, sure - me - Anybody take a ten dollar bill - - . "

The defendant testified that after her marriage and before her husband left for the Navy, they lived in a trailer on Clear Lake Avenue, Springfield; that she was employed and selfsupporting; that her husband never brought any money home; that he drove a cab and stayed out nights; that after his entrance in the Navy, she complied with his request and joined him in Memphis in December, 1943; that in February, 1945, he requested a divorce because, he said, he had a girl pregnant who needed the fifty dollars a month allotment money; that he said he also had another woman pregnant but she couldn't find him by reason of his use of an assumed name. She introduced into evidence a letter from plaintiff, dated Jamuary 23, 1945, in which he asked for a divorce and stated that he would never quit until he got it; no accusations of any kind were made in the letter. Witness denied that she and Harry Neal stopped on the road and had intimate relations on the return trip to Springfield; denied that she ever had sexual relations with him in the trailer or on any other occasion; denied that she had intercourse with anyone other than her husband since their marriage. On cross examination, she stated that she and her husband lived together a while before their marriage as husband and wife; that during their married life she had been in taverns drinking beer but never alone with a man; that at one time she had been in LLoyd's tavern with Harry Neal and his wife.

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Bell Flowers testified that she was the mother of defendant; that during the time the trailer was used, she, at all times, lived there with her daughter; that Harry Neal was there several times and that most of the times he was accompanied by a woman not his wife; that he never had any opportunity to be alone with her daughter; that the daughter never gave her any sleeping pills.

Andrew White, called as a witness on behalf of plaintiff, testified that he was acquainted with both husband and wife; that in October, 1943, he saw defendant at a tavern, between eight and nine o'clock in the evening, and that she was in the company with a man not her husband; that the two of them left the tavern and went into a tourist cabin; that witness, in a car, was waiting for another man and remained there for about forty minutes and never did see defendant come out; that no lights were turned on in the cabin the entire time. On cross examination, witness stated that he was well acquainted with Harry Neal and occasionally drank with him; that he did not narrate this incident until several days before the trial.

and Andrew White, bears directly on the commission of adultery by the defendant. As to the testimony of plaintiff's brother, Harry Neal, there is no requirement that the credulity of the Chancellor be taxed beyond the standards of any reasonably minded person. In evaluating the testimony of the witness, Andrew White, his friendship with plaintiff and plaintiff's brother must be kept in mind, together with his concealment of his knowledge until several days before the trial. There is also the statement in the letter of plaintiff to defendant in regard to a divorce, that he would never quit until he got it.

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Irrespective of this, the rule is well settled that
the credibility of a witness in a case tried before the Court
and the determination of the weight to be given to such testimony
are for the Trial Court. The Chancellor, who saw and heard the
witnesses testify, had an opportunity to observe their conduct
and demeanor while testifying and is therefore in a better position
to weigh the evidence than is a reviewing Court. Where the evidence
is merely conflicting, this Court will not substitute its judgment
for that of the Trial Court.

It cannot be said the finding of the Trial Court was against the manifest weight of the evidence and the order dismissing the complaint for want of equity is affirmed.

Affirmed.

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MARKS HURTT and MARTHA HURTT, his wife,

Appellees,

v.

FLORENCE CONKLIN and NELLIE M. CONKLIN,

Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

32 I.A. 314

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a habeas corpus proceeding brought by Marks
Hurtt and Martha Hurtt, his wife, of Geneva, Ohio, to recover
the custody of their fourteen year old daughter, Dorothy
Ellen Hurtt (hereinafter referred to as Dorothy), from
Florence Conklin and Nellie Conklin of Chicago, Illinois.
The judgment order of the trial court awarded the custody
of Dorothy to her parents and the Conklins appeal.

For a clearer understanding of the issues presented in this case it is necessary that the factual situation be set forth somewhat fully. The evidence discloses that the defendants, Florence Conklin and Nellie M. Conklin, are sisters and that they are first cousins of the plaintiff. Marks Hurtt; that he lived with the Conklins in Chicago from 1911 until 1914, when he married his present wife, Martha Hurtt; that the Hurtts have nine living children; that the oldest of these children, Bill, was born in Chicago and when he was a baby the Conklins took care of him a great deal of the time; that the Hurtts moved to Ohio and when Bill was about eight years old his parents gave him to the defendants to raise; that the Conklins kept him at their own expense and sent him through three and one-half years of high school, when he quit school of his own accord in 1934 and went to work; that Bill is now married, has two infant boys and lives in Chicago; that in the fall of 1934 Betty Jane, the oldest daughter of

MARKS HURTT and IN I'M NURTT, his wife,

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MR. JUSTICA LULLIVAN BOLLVERED THE OFFICE OF THE COURT.

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Hurtt and Martha Hurtt, his wife, of Geneva, and, to recover
the custody of their fourteen year old designer, octiny
Ellen Hurtt (hereinafter referred to accorothy), from
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The judgment order of the trial court deartee. The success
of Dorothy to her parents and the Conklins opens.

For a clearer and restanding of the desses presented in this case it is mocessany that the floor I sin it is no set forth somewhat fully. The cyliders offschopes of v the defendants, derence Conthin and Hallie I. Contlin, are disters and that they are first countrs of the abintiff, Morts durtt; tist he lived with the Jonalins in Distance from 1911 until 1914, when he married his present wife, farthe Marti; that the Martis have mine living shiften; that the oldest of these children, Eill, was born in Obics,o end when he was a beby the Jonklins took care of this a great deal of the time; that the Burtts moved to Chio and when Dill was about eight years old his parents gave him to the derlendants to raise; that the Conklins kept him at their own supense and sent him through three and one-half years of high school, when he quit school of his own accord in 1934 and went to work; that Bill is now married, has two infant boys and lives in Chicego; that in the fall of 1934 Betty Jame, the oldest daughter of

the Hurtts, then sixteen years old, came to Chicago to visit the World's Fair and brought Dorothy, then four years old, with her; that they both stayed with the Conklins until Betty Jane, shortly thereafter, secured employment as a maid with the assistance of Florence Conklin; that Dorothy remained with the Conklins until the following May, when Florence Conklin and Betty Jane took her to the Hurtt home in Ashtabula, Ohio; and that the Hurtts later moved to Geneva, Ohio, where Dorothy started to school but failed in some of her work.

The evidence further discloses that in January, 1936, when Dorothy was six years old, Betty Jane brought her back to the home of the Conklins; that the Conklins immediately started her to school, where she had to take her first semester's work over again; that from that time until June, 1943 she lived with the Conklins, making short trips to the Hurtt home in Ohio, usually with Florence Conklin, during each summer vacation except one; that she spent the greater part of her vacation periods with the Conklins at a summer place they had near Libertyville, Illinois; that she did very well in her school work, engaged in 4-H work, did some 4-H demonstrating, enjoyed working in the garden, did some canning of vegetables herself and was taught by Florence Conklin to perform household duties, including cooking; that Dorothy had piano lessons during the last three years she was with the Conklins; that she had engaged in Girl Scout work and won several medals; and that she had formed many close friendships with members of her class at school and with others and generally lived the life of a normal, healthy, happy girl.

In relating the circumstances under which Dorothy was sent to live with the defendants when she was six years old, Florence Conklin testified that Mrs. Hurtt wrote a letter to her and her the Murtts, then sinteen years old, came to dide go to visit the World's Fair and brought form hy, then rour years old, with her; that they both stayed with the enhine until Batty Jane, shortly thereafter, savired employment as a sid with the time assistance of Florence Conding that sorothy renained with the Condins until the Following May, when Florence Jonklin and Betty Jane took her to the Jurts home in Ashtabula, Chie, and that the Murtts Litzr goved to coneve, Ohio, where Corethy started to school but Inibad in some of her work.

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In relating the circumstances under which Dorothy was sent to live with the defendants when she was six years old. Figure Conklin testified that Mrs. Murtt wrote a letter to her and her

sister, which they were unable to locate; that this letter stated in substance that "if we would take Dorothy and give her the advantages and education here and send her through school as we had Bill that she could stay with us as long as we felt that we could keep her"; that shortly after she replied to Mrs. Hurtt's letter Dorothy was brought to her home by her sister, Betty Jane, and that she remained with her and her sister from that time until the latter part of June, 1943. Nellie Conklin testified in this regard to the same effect as her sister Florence.

Marks Hurtt testified that when Dorothy was sent to live with the Conklins in 1936 his wife "was sick and Betty thought it would be nice providing that the girls [Conklins] would take her [Dorothy] up for a short time until the Mrs. had getten well \*\* \* so she [Dorothy] stayed there right along. So finally they [Conklins] said they would keep her, and at any time that we wanted her we could have her"; that the understanding was that he could have Dorothy back at any time he wanted her and that the Conklins "were to bring her down for summer vacations." Hurtt denied that he ever told the Conklins at any time that, if they took Dorothy to live with them, they could keep her through her school years and he also denied that he ever wrote them to that effect.

Martha Hurtt testified that she permitted Dorothy to go to live with the Conklins in 1936 because she had six children at that time; and that her husband's "financial circumstances \* \* \* were very bad and she was sick in bed." She denied that she ever told "either of the Conklin girls that Dorothy could remain with them during the entire period that she would go to school" or that she ever made "any agreements of any kind with the Conklin girls in reference to the future of Dorothy" and stated that she never had any discussion with the Conklins

sister, which they user a unable to locate; that this latter stated in substance that "if we would take becount and give her the advantages and education here and bend has through school as we had Mill that she could otey will us as long as we felt that we could keep her"; that shoully after she replied to irs. Murti's letter Forethy was trought to her howe by her sister, Patty Jane, and that the hate the rankined sith nor and her sister from that the latter part of June, 1943.

Wellie Conklin testified in this regard to the size effect as her sister Thrence.

Marks Furtt testified that then accord was sunt to live with the doublins in 1956 his aife "was cick and Decty thought it would be nice providing that the girls [doublins] would the per [Dorothy] up for a short time until the irs. had gotten well they so she [Dorothy] stayed there right along. So finally they [condins] said they would thep har, and at any time that the wanted her we could have borothy back at any time he wanted her and that he could have borothy back at any time he wanted her and that the Conklins "were to bring her do m for summer vacations." Hurtt denied that he ever told the conding that he are told the could keep her through her school years and he also denied that he ever told the star they could keep her through her school years and he also denied that he ever wrote

Mertha Hurtt testified that she permitted Dorothy to go to live with the Conklins in 1936 because she had six children at that time; and that her husband's "financial circumstances \* \* \* were very bad and she was sick in bed." "he denied that she ever told "either of the Conklin girls that borothy could remain with them during the entire period that she would go to school" or that she ever made "any agreements of any kind with the Conklin girls in reference to the future of Dorothy" and "stated that she never had any discussion with the Conklins

concerning those matters.

The evidence also discloses that Dorothy did not go to Ohio during the summer vacation period of 1942 because her mother and some other members of her family were then in Chicago; that from March, 1943 to June 28, 1943, Mrs. Hurtt was in Chicago working as a cashier at Mandel Brothers; and that during that period she frequently visited Dorothy and had her with her part of practically every week-end.

On May 19, 1943 Marks Hurtt wrote a letter to Dorothy, which was in part as follows:

"Well Dorthey your school will be out next month and I want you to come home for one month as you did not come Last summer and I am not any to well as I have told you I will send you a ticket and as you are 13 years old you can come all right then you can go back for the Balance of your vacation with in mind you have Plased your Father I can assure you will have a nice room up stairs and be treated as one of my children as you are I have not Been able to see you or have any time to spend with you But I am 58 years old and not any to well for what I have gone through with and I mite not Be able to stand this as I am pretty thinn 129 Pounds and I always was 135 to 138 so I want to Look forward to your home comeing to Dadie if you still Love me But you talk this over with FB [Florence B. Conklin] and NM [Nellie M. Conklin] and make arrangements for that Date I can meet you at the train I will see you get Back all right as I am still Boss and will Be untill dead give Every body my Love and my very Best wishes and worlds of Love to all I am as Ever your Loving Father.

Marks F. Hurtt

write when you can."

In response to the foregoing letter Dorothy wrote to her father agreeing to his plan and on June 14, 1943 he acknowledged her letter and said, "Come on the 26 of June and go Back as you said I will mail you some money next week I can asure you we will have a good time as they are plenty of room here." Later in the letter he said, "Just bring what you will need."

On June 28, 1943 Dorothy went with her mother to Geneva, Ohio. On June 30, 1943, Marks Hurtt wrote a letter to the Conklins in which, after indicating that there was considerable trouble in his home, he said: "She [Martha] said if things

concerning those (alters.

The evidence also of pulses the thereony divisors so to the during the sugger vacation period of him it can use nor mother and some other southers of her fault, here that the Ohiouge; that from Heren, less to sure is less; that from Heren, less to sure is less; that the during as a result of land, returned and that during that period she from unity virtues to obtain and had that with her part of practically every voicems.

in May 19, 1901 acts Nurth arcte o lesson to Torothy, which was in part of follows:

Well Torshey your soled will be or writ worth and I want you to case home for any continue point as you a por with not come will send you a tablet and as you are is rearrable; for a will send you a tablet and as you are is rearrable; for came come all right ther you sail to be at for the Talerse of your vacation with in mind you have dread rous bether I can assure you will have a rice rous as attained has be received one of my shidten as you are in a venetal new least be received or have any time to spind with you hat I am you grave old and not any to well for what I have gone though with and I mite not my to well for what I have gone though think and I wite and I always was light of lift of this as a man and to hook forward to your and I always was light of lift or willing home comping to made if you will not a strangements for this and all helide. I conking home comping to well for the continue arrangements for the train I will see you get Suck all right as I am still loss and will Be untill dead give very toly at acve and my very losy wishes and will be untill dead give very toly as a law tour very losy. Take and will Be untill dead give very toly as a law tour wery losy. Take and will Be untill dead give very toly as a law tour.

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write when you cer."

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On June 28, 1943 Dorothy went with her mother to Geneva, Ohio. On June 30, 1943, Marks Murtt wrote a letter to the Conklins in which, after indicating that there was considerable trouble in his home, he said: "The [Martha] said if things

dont turn different up there with Bill not Respectin Betty & children & Phylles she was not going to Let Dorothy come Back I told her I will see to that when the time comes."

On July 13, 1943, Martha Hurtt wrote a letter to the Conklins, which is in part as follows:

"We have decided that D. E. is not coming back to Chicago. We are going to keep her here.

"After all Caroline & M. L. [Mary Lou] need some consideration - Caroline needs some one her own age - and I intend that Car & D. E. [Dorothy] grow up as sisters should. I told D. E. last night she wasn't going back, and I mean just that.

"D. R. is our daughter and I intend she will be raised like the rest and not feel she should be entitled more consideration than the rest."

Again on August 3, 1943, Martha Hurtt wrote the Conklins a letter in which she said:

"In answer to your letter the answer is still 'no.' I told you I intended having Dorothy. \* \* \*

"This thing of one having more than the other and thinking they are entitled to more don't go around here and thats D. E. attitude. She keeps talking about the privileges and clothes, she gets up there. If she had such lovely clothes, I sure didn't see any, so she is going to accept things the same as Caroline. I don't intend to let Carolineg go thru life thinking D. E. is better than she is or entitled to more than she is."

Before leaving Chicago with her mother in June, 1943, arrangements had been made for Dorothy's participation in a large church wedding ceremony. Upon their promise that Dorothy would be returned, she was permitted to visit the Conklins to take part in such ceremony. She stayed with them for about three weeks and during that time she pleaded with them to keep her. They told her that they had to return her to her parents' home because of their promise to do so.

There is undisputed evidence in the record that in Octob', 1943 Marks Hurtt stated that if Dorothy remained in Geneva, mioshe would never finish high school but that he had "washed his hands" of the whole affair and that perhaps if she did fail

ont tur ciriorent up there it is but not busy sould water word to be torcolly come a confident in the rest of the three comes.

Confiling, which is in part of Collows;

We have decides that D. H. is not coming back to this so. General to keep her here.

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"In answer to your letter the newer is still 'no.' I told you I intended having Dorolly.

"This tring of the larth, some land the other and thinking they are entitled in the coestation of the count have and that by a retainment is a retained to the privile read slothes, the sum thing that the gets of there is a control lovely things the same as Caroline, if the interval to accept things the same as Caroline, if the interval to freching the life thinking i. . . is actor that the control of the noresthen she is."

Herore leavin, whe go ith for mother in the 1966, arrangements had been into for Derethyth a which without in a large church wedting caremony. Upon their promise that Derethy would be returned, she was parabled to winth the Conkilns to take pert in such caremony. She stayed with them for about three weeks and during that time she pleaded with them to keep her. They told her that they had to return her to her parents! home because of their promise to do so.

There is undisputed evidence in the record that in October, 1943 Marks Nurt stated that if Dorothy remained in Geneva, Autoone would never finish high school but that he had "washed his hands" of the whole affair and that perhaps if she did frill

in her high school work then he could do something about it.

Dorothy testified in substance that the only home she had ever known was with the Conklins; that they had always taken care of her and been very good to her; that she had been taught to love her family and to respect them; that she loved her brothers and sisters; that she had gone through school in Chicago with many associates and had learned to care for them; that she had a real ambition to complete her education; that she had received plane lessons, a religious education and training in domestic duties; that she wanted with all her heart to return to the Conklins; that she had tearfully pleaded with her mother for permission to return, but was never given any answer but a flat "no"; that while she was in her parents' home between June and December, 1943 she saw and heard quarreling between her brother and mother, between her sisters and brother and between her father and mother; that on one occasion she heard the beginning of a violent argument in the upstairs bathroom between her father and mother and brother Lawrence but that she did not hear all of this argument because she and her sister were sent "uptown" so that they would not hear it; and that every night at bedtime she prayed that she might get back to the Conklin home.

On December 16, 1943 Marks Hurtt wrote a letter to the Conklins requesting them to invite Dorothy and her younger sister Caroline to come to Chicago for the Christmas holidays. This letter was in part as follows:

"I have not said a word about it as I have so much trouble here at home they surely dont care for anything and trys to Black me in ever way she [his wife] now has no use for Wilbert & now it is Dick and they Both are nice fellows \* \* \* if they are a H it is down here \* \* \* the fare is 16.28 round trip and I haven't got the money \* \* \* my salary is now 34.94 after they take out taxes and 20 per cent my Grocery Bill here is 25.00 each week so I have 9.94 to pay Rint and coal Lights & Water so it will Be up to you to ask her if she

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had ever ano as we so the congline; that they but always taken care of her and been very good to her; that pho had been tought to love has fabilify and to read this good that loved ni focaco al morale casa, in a see destina transfer can exectioned and guest) con on o or hear at that has new looses year adde og other than the last a real carifficate of coldinar field and a feet size she had the live passes a seligious education and TOR II. Wil Sedmon only John (arrivant sidnesson at gaishout ್ಷತ್ತಿಸಿಸಿದ್ದ ಕ ಬಹು ಆಗಿದ ಕೆಂಗ್ ಕ್ಷಮಾಗಿದ್ದು ಈಗೆ ರಕ್ಷ ಗಡುಕೆಂದ ರಕ್ಷ ಕ್ಷಮಾಗಿ pleaded with her mother for partus ion to return but wed and off (III) that tout the true the remain whe movie reven in her purents! here hetween June and a cember, apply the new neested (aniton has contons as mosted palleraus brack has her sisters and brother and brivern har lather and noticer; that on one deduction she heard the beginning of a violent argument in the upstairs buthroom between her father and To IIn ther for this edutable and some well writtend into wendern this engument because she and her states were pent "appoynt so that they real not be with the over night it bedtine she prayed that she might gut back to the Conidin Lone.

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will let Dorthey and Carline come after Christmas \* \* \* realy Girls I am in the Deg house sticking to Betty & Wilbert Martha has got control and you will just haft to Play it easy what you write."

The Conklins complied with his request and wrote Dorothy inviting her and Caroline to come to Chicago during the Christmas holidays. Her brother bill sent her a round trip ticket and she and Caroline arrived at the Conklin home the Sunday evening after Christmas. On the following Thursday Dorothy had a talk with Florence and Nellie Conklin in which she asked them if she could not remain with them. After consulting her attorney Florence Conklin told Dorothy that they would do what they could to keep her. Dorothy then wrote the following letter to her parents:

"Dear Mother and Dad

"The more I have thought about going back to Geneva, the more I have felt that I just can't do it. I have asked Aunt Florence and Aunt Nellie if I can't stay with them, and they say that they will be glad to have me.

"I hope that you won't be hurt over this and that you will consent to my staying here. This has been my home for so long that it seems much more like my real home. I really tried very hard this fall to be happy with you and to be a good girl, but I was so unhappy that I just can't go on.

"I want most of all to get a good education and to do well in my school work. Here at Swift School I have always done pretty well, but in Geneva I was failing, and I am afraid that I would never get through high school there. Here I can go on with my class, and I will certainly try to do good work and to graduate.

"Although you don't [know] it, I cried myself to sleep lots and lots of nights this fall, and I lost nearly thirteen pounds in weight when I should have been growing and gaining.

"Please, please say that it is all right for me to stay and please don't blame anyone except me for my decision, for this is really what I want most in the world.

"If you really love me, you will want me to be happy and it will make me love you more, but, if I have to go back to Geneva, I think I will just die.

"Lots of love to all, Your loving daughter, Dorothy.

P. S. Caroline will come home Sunday. Bill will have the conductor look after her."

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P. S. Caroline will come home Sunday. Bill will have the conductor look after her."

Shortly after her receipt of the foregoing letter from Dorothy, Mrs. Hurtt came to Chicago and lodged a complaint in the Juvenile court against the Conklins, charging them with contributing to the delinquency of Dorothy. Upon investigation said complaint was dismissed. On the Sunday prior to the day on which this habeas corpus proceeding was instituted, several of the adult members of the Hurtt family went to the Conklin home and Dorothy's father attempted to take her away by force but she succeeded in getting into the bathroom and locking the door. Some of the Hurtts then attempted to force the door open by pushing and kicking it. Dorothy was screaming and the house was in an uproar, when defendants' attorney, who had been summoned by telephone, arrived and pursuaded the Hurtts to leave without Dorothy. A few days thereafter plaintiffs filed their complaint herein.

It is impossible within the confines of this opinion to recite in detail the evidence as to the almost constant trouble, quarreling, wrangling and bickering that occurred in the Hurtt home. As has been seen, in one of his letters to the Conklins Marks Hurtt described his home as being like a hell, principally because of his wife's conduct. This letter was written December 16, 1943, while Dorothy was at the Hurtt home and after she had been there more than five months. While Marks Hurtt professed in several letters to the Conklins and to Dorothy that he was the "boss" of his family, he never quite succeeded in being such. It clearly appears that when his wife refused to return Dorothy to the Conklins in the summer of 1943, Martha Hurtt was the dominating force in the home and Hurtt admitted that she was. She forced Dorothy to remain in Geneva, Ohio, notwithstanding her husband's specific and definite promise in his letters of May 19, 1943 and June 14, 1943 that she would be returned to the Conklins after she had

Shortly after her receipt of the formoting latter from Jorothy, Mrs. Nurth came to this, or a lodged a compliant in the dayonine ochrological latter and subject on the with contributing to list alies, and of a colog and meaning the latter and of a colog and to the candard latter and subject on which this habes englas respecting was incitivated to the day on which this embers of the land formit to the donklin lone and percelled antible at the land latter and latter at the land at the force the she succeeded in posting the force the force of the she succeeded in posting the force the force of the force of the latter and the lone was in an appoint it. In an infludent the thorney, who had been sun oned to the test care, and well and greened the latter plaintiffs the lower actions oned in the latter plaintiffs the law of the care and latter and latter and latter plaintiffs litted alone one in the latter and latter and latter plaintiffs litted alone. And the latter plaintiffs litted alone and latter and latter plaintiffs litted alone and latter and latter plaintiffs litted alone and latter and latter and latter and latter and latter and latter plaintiffs litted alone and latter and latt

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spent the month of July, 1943 at his home.

Marks Hurtt earned meager wages and his family was more or less poverty stricken. He did not receive much, if any. help from his older children, because they married at an early age and left the home. Two of the daughters. Betty Jane and Martha Bell, married when they were 17 years old. Betty Jane was living with her husband at the time of the trial of this case but she had theretofore filed three suits for divorce against him, which she later dismissed. Martha Bell at the time of the trial was not living with her husband and had separated from him twice, although she had only been married a few months. Marks Hurtt wrote a letter to the Conklins in which he referred to a vicious quarrel in his home in 1943, while Dorothy was living there. This quarrel involved his three daughters, Betty Jane, Phyllis and Martha Bell. While it appears that Derothy was not present at the time, the quarrel culminated in a brawl in which Phyllis and Martha Bell "beat up" Betty Jane.

According to Martha Hurtt, she was not on friendly terms with her oldest son Bill who had been raised by the Conklins, because of what she considered his wrongful attitude toward her and his lack of respect for his sisters, Betty Jane and Phyllis. She testified that she learned in the summer of 1943 that Bill got in trouble with three other boys in 1934 when he was a senior in high school and had been convicted or receiving a stolen automobile. The record of his conviction pursuant to which he was placed on probation was introduced in evidence on plaintiffs! behalf. This evidence could have been introduced for no other purpose than to smear Bill and in turn the Conklins. It was offered on the pretext that it tended to show that the Conklins did not raise Bill properly or he would not have become involved in the trouble that resulted in his conviction and that therefore they were not fit to have the custody of Dorothy. Bill was not

spent the mentr of July, 1943 at his home.

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a witness in this case but in her zeal to prevail in this litigation his mother made this unpardonable attack on him and the Conklins. Bill, who was married at the time of the trial and had two infant children and whose past conduct had been otherwise exemplary, was thus gratuitously besmirched by his own mother by her resurrection and introduction in evidence of the record of this forgotten incident of his boyhood.

On March 15, 1944, within 30 days after the entry of the judgment in this case awarding the custody of Dorothy to her parents, defendants filed a motion to reopen the hearing for the purpose of permitting them to introduce in evidence a letter written to them by Marks Hurtt on July 4, 1941, which letter, after inviting the Conklins to visit his home in Ohio with Dorothy, stated among other things:

"I have given Martha to understand that Dorthey is going to compleate her school work & collage with you girls of Dorothy wants to and I know she does \* \* \* Martha is all right untill Lawrence & Betty and the rest getting talking when I am at work. But Martha know right well now I will not stand for any more kid stuff as I will not live this way any longer as you girls have dont so much for us and with a Christian heart I can neaver forget \* \* \* I dont think Martha some times is all there I am sorry to say with the kids trying to run things there way she is easy persuaded \* \* \* Just bring what things Dorthey will need as she is going to Continue her shool work with you girls, as you have spoken."

Since defendants' motion to reopen the hearing for the purpose of presenting in evidence the foregoing letter complied with all the legal requirements for the granting of such motion, the trial court erred in denying it. Not only did this letter constitute competent and material evidence but it has an important bearing on the issues involved herein and we will therefore consider it as part of the evidence in this case.

The theory of the Conklins as stated in their brief is that "the welfare and the best interests of the girl are controlling; that the original arrangement was that they were a witness in the case with her bull of proved in this littintion wis tutle and the obtain the tending. This who was married to the time of this trial and the tending, who was married to the time of the bed to the matter that the time protest conduct had been otherwise exemplary, was thus protuitously bestirehed by his our mether by her remarration and introduction in evidence of the record of this longestar incident of his beyacet.

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On herek 17, 194, within 30 days whiter the entry of the judgment in this case awarding the automorphism to her parents, defendants filed a notion to reopen the hearing for the purpose of parentting them to introduce in evidence a letter written to then by Earlis Tarit on July 2, 1941, which lotter, after inviting the Conkline to visit indhame in date with orethy, stated amon, of a taings:

"I have given derive out a college him that Dowling is going to complette her salood out a college him you girls of Derethy wints to and he all see herethy wints to and he all right untill Lavrence A sety ere the inest poting of all right untill Lavrence A sety ere the inest poting of all with a wint I am at work, into action or a coll new a all new a all new a stand for any most that stand for any most that stand for any most have deat so main for the sale way of the control of a stand with a control of a carry to ser with the derivative some times as a little of an acaver to serve the sale that the wint things there way she is easy personned to trying to run things there way she is easy personned to the time what things bottley will need as she is going to continue her shool fork with you it is, as you have spoken."

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to undertake to raise Dorothy and send her through school: that such agreements, while not absolutely binding, will be given great weight by the courts, especially when acted upon for many years, and when it appears to be for the best interests of the child that the agreement be carried out: that, while parents have a superior right to custody originally, that right may be lost (and in this case is lost) by permitting the child to be raised from infancy in another home, where ties of love and affection are formed, friendships made and cemented, and associations formed which cannot be broken without great harm to the child and great pain to both the child and to the persons who have expended their love and care and money upon the child"; and that "upon the evidence in this case, minds cannot differ upon the proposition that the best interests and welfare of the child demanded that she remain with the Conklins nor that her prayerful wishes were to stay here."

Plaintiffs' theory is that "as parents, they are entitled to the exclusive care and custody of their own child, that they are fit and proper persons to have her care and custody, and that they have not forfeited that right by any act of their own"; that "they have permitted Dorothy to reside with the defendants with the understanding that she return when requested; that when they learned of circumstances that led them to believe that Dorothy's character was being improperly molded and she was being estranged from the rest of her family, and when they received information defendants had concealed from them which convinced them that the Conklin home was not a proper home for Dorothy, and as their financial circumstances had changed for the better, they requested that Dorothy be returned to them, and she was so returned in compliance with

to undertake to rise orothy and still its dirough school; that such spreaments, while not conclude in binding, will be given great and it, or the loadis, especially then acted upon for burny years, and when it is to be for the best tano leburas el finit cum l'est ture l'Allie els le salessefini thet, while parents have a on order right to castedy outginality, that wight to loss that it it. then is heath by persitting the state to be reduced in a row in emotion hole, where thes of here and thereign we teame, retained h ed follow built he was an 20 stone of months for the count browen attroat grant there to the cities on greet path to actin bur avel tildir im. Type var of theory elf or bus fine off eage and womey upon the chill; your that agenture widence in bida eace, nimis e mues cint e a un bia proportition duct the ena da a sella de e sello est de en les dans edancedat l'aed remain with who won line and was the property listen tour to step here.

 their agreement"; and that "subsequently, after Dorothy had been returned to plaintiffs, defendants did procure custody of Dorothy by means of a ruse and were thereafter improperly depriving plaintiffs of her custody."

It should be stated at this point that there is no evidence in the record that supports plaintiffs' theory of fact that while Dorothy was with the Conklins her "character was being improperly molded and she was being estranged from the rest of her family" or that "the Conklins! home was not a proper home for Dorothy." A complete answer to this portion of plaintiffs' theory is found in the opinion rendered by the trial judge giving the reasons for his decision, wherein he stated that the Conklins were "very fine, worthy people" and that they did "an excellent job with this girl." It should be further stated that there is no evidence in the record that the Hurtts or either of them "requested that Dorothy be returned to them" permanently in June, 1943, that "she was so returned in compliance with their agreement" or that thereafter the Conklins "did procure her custody by a ruse." It is undisputed that the Conklins did not turn Dorothy over to the Hurtts in June, 1943 in compliance with any agreement with them to do so and that neither of the Hurtts requested that Dorothy be returned to them permanently at that time. fact is that when Dorothy's mother took her to Geneva. Ohio in June, 1943 it was upon the explicit promise of her father that she would be returned to the Conklins to continue her schooling in Chicago. If there was any ruse perpetrated in this case it was by Mrs. Hurtt in taking Dorothy to Geneva, Ohio under the pretext that she would be returned to Chicago and then forcing her to remain there, notwithstanding that her father had written her that he would send her back to

their agreement; and that "subsequently, after Deromy had been returned to plaintiffs, defendants and precure sustedy of Deroday by means of a ruse and were transafter improperly depriving plaintiffs of her custody."

on al ore. I that Sure abit to h date of bloods II ovidence in the record that supports plaintiffer throwy of fact that while 'woothy was tin the conditus her char cter was being inproperly molded and she was being cutranged from the rest of her family" or that "the longins" home was not a proper home for corothy." A complete answer to this portion of plaintiffs' theory is found in the opinion rearresd by the trial judge giving the concerns for his decision, therein he stated that the condition were "very line, vorthy people" blucks of ". It's wind tob out to det and bib year furt board be further stated but there is no cytonec in the ricord that The Martts or sither of them bequested that cretar be returned to them permutabily in three, high, that "the tes so returned in compliance with their great, the or dirt thereafter the Conllins "did product on outlong by a rise." It is madisputed that the lengths aid to them browly over to the Hurtts in June, 1943 in compliance with any agreement with them to do so and that neither of the Martts requested that Dorothy be returned to them permanently at that time. The fact is that when lorothy's nother took her to Geneva, Ohio in June, 1943 it was upon the explicit promise of her father that she would be returned to the Conklins to continue her schooling in Chicego. If there was any ruse perpetrated in this case it was by Mrs. Murtt in taking Dorothy to Geneva, Ohio under the pretext that she would be returned to Chicago and then foreing her to remain there, notwithstanding that of Mosd red bres bluew of that he need her back to the Conklins if she would spend the month of July with him in Ohio. Dorothy's father told her to get the permission of the Conklins to make this trip. Just a few days before Mrs. Hurtt took Dorothy to her home in June, 1943 she discussed with the Conklins the kind and color of dress that she should wear upon her graduation from grammar school in Chicago the following January. It might be added that the Hurtts' "financial circumstances" had not changed "for the better" in June, 1943, as they claim. As late as December, 1943, Marks Hurtt wrote the letter to the Conklins, heretofore set forth, in which he indicated that his financial affairs were in a very precarious condition.

The judgment order of the trial court was predicated primarily upon the theory that the family is the foundation of civilization, that its permanence and stability should be safe-guarded and that the technical legal right of plaintiffs to the custody of Dorothy was paramount and superior to her best interests and future welfare, unless the Hurtts had for-feited this right by reason of their unfitness.

In our opinion the finding of the trial judge that there was nothing in the record "to indicate that either the father or mother ever intended to surrender the custody" of Dorothy to the Conklins is against the manifest weight of the evidence and it is also our opinion that the trial judge did not give proper consideration to the best interests of Dorothy and ignored her wishes and feelings in the matter, although she was the person whose welfare was most deeply involved in this proceeding.

Did plaintiffs agree that defendants were to have the custody of Dorothy until she completed her education? Marks Hurtt's testimony that his arrangement with the Conklins was that they should take Dorothy and keep her until such time as

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Did pletheiffs agree the defendants were to have the custody of Dorothy until she completed her education? Marks Hurtt's testimony that his arrangement with the conklins was that they should take Dorothy and keep her until such time as

he requested her return was not only completely refuted by his own letters to the Conklins and to Dorothy, heretofore set forth, but these letters corroborated the testimony of the Conklins that when Dorothy was brought to them by Betty Jane in January, 1936, the arrangement with the Hurtts was that they [the Conklins] were to care for and raise her at their own expense until she finished her schooling. Even after Dorothy was brought to the Hurtt home in Ohio by her mother in June, 1943 and Mrs. Hurtt decided to force her to remain there and as late as December, 1943, Hurtt wrote several letters which confirmed the Conklins' version of the arrangement under which they took Dorothy into their home. inconceivable that Marks Hurtt would testify as he did unless he thought that his letters to Dorothy and the Conklins were no longer in existence and that he could not be confronted with them. In view of Hurtt's letters the only reasonable explanation for his testimony in respect to his arrangement with the Conklins as to Dorothy is that his wife dominated and influenced him to the extent that he was even willing to commit perjury at her solicitation. Although Martha Hurtt testified that she was ill at the time and made no arrangement with the Conklins concerning their custody of Dorothy, the evidence conclusively shows that even though she did not herself make the arrangement which the Conklins testified she did, she acquiesced in same for more than seven and one half years and did not make up her mind to repudiate the arrangement until her animosity toward her son Bill and the Conklins, because of their continued friendship with him, prompted her to do so during the summer of 1943.

Prior to the time that Dorothy went to Ohio with her mother on June 28, 1943, Mrs. Hurtt admits that she neither suggested nor intimated to the Conklins that the child would

he requested her return was not only completely reduced by his own letters to the Contlins and to Porothy, Leretofore set forth, but these letters corroborated the testimony of the Conddins that when Dorothy was brought to them by Retty Jame in Jenuary, 1936, the errongment little the crtts were that they [the conditins] were to care for and roise her at their own ow onse with the finished h r schooling. Twen with Borothy is brought to the Tartt home in this by her mether in June, 19eg and 'rs. Burtt decided to force has to remain there and as Late as Locember, 1943, Murtt wrote several lotters which confirmed the loweline version of the argumecment under which they took brothy into their home. It is inconceivable that 'arks 'artt would testify as he if unless is thought that his letters to "crothy and the conding tere no longer in bullet see and that he could not be contronted with them, In view of 'hrtt's letters the only reasonable inchego and sold of forgion of your that all sol modifically with the sending as to prothy is that his that deprinted and influenced its to the entent that he was even willing to consit perjury at her solicitation. Ithough Martha furt testified that sine was ill at the time and made no arrangement with the Conklins concerning their sustody of orothy, the evidence conclasively shows that even thou h she did not herself make the arrangement which the Conklins testified she did, she acquiesced in same for more than seven and one half years and did not make up her wind to repudiate the arrangement until her animosity toward her son Rill and the Conklins, because of their continued friendship with him, prompted her to do so during the summer of 1943.

Frier to the time that Dorothy went to Ohio with her mother on June 28, 1943, Mrs. Hurtt admits that she neither suggested nor intimated to the Conklins that the child would

not be returned to them and from January, 1936, when Dorothy was turned over to the Conklins to be raised by them, until Martha Hurtt advised Florence Conklin by letter on July 13, 1943 and again on August 3, 1943 that she was going to keep Dorothy, neither of Dorothy's parents had ever by letter or spoken word or by any act of theirs indicated an intention to retake the child or to assume the slightest burden with reference to her. Martha Hurtt also admitted upon the trial that she did not intimate or suggest to Dorothy prior to June 28, 1943, when she took her to Geneva, Ohio, that she would not be returned to the Conklins.

In plaintiffs' brief it seems to be conceded, in effect at least, that the evidence shows that Dorothy's father did agree that the Conklins should have custody of Dorothy until she finished her schooling but they say that "any act or representation by Warks Hurtt cannot therefore be construed to prejudice the rights of Martha Hurtt." As already stated, the evidence shows that Martha Hurtt was either a party to the arrangement or that she acquiesced in it with full knowledge of its intent and purpose.

In view of the testimony of the Conklins, the letters of Marks Hurtt corroborating their testimony and completely refuting his own testimony and Mrs. Hurtt's conduct in permitting Dorothy to remain with the Conklins without objection for more than seven and one half years, it must be held that the finding of the trial court that there was nothing in the record "to indicate that either the father or mother ever intended to surrender the custody" of Dorothy to the Conklins was against the manifest weight of the evidence.

The rules of law governing the right to the custody of children are well settled in this state but difficulty is

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often encountered in applying the law to the facts and circumstances of the particular case.

It has been repeatedly held that in controversies involving the custody of a child between its parents and other persons to whom its custody has been given by the parents, the welfare of the child is the matter of primary and paramount importance. (Sullivan v. The People, 224 Ill. 468; Cormack v. Marshall, 211 Ill. 519; People v. Porter, 23 Ill. App. 196.)

Of the numerous authorities cited by the parties in support of their respective positions we think that People v. Porter, 23 Ill. App. 196, presents a factual situation which most closely resembles that presented here. That was a habeas corpus proceeding brought by the father to recover the custody of his daughter, then eleven years of age, from Mr. and Mrs. Porter. The trial court remanded custody to the Porters and its judgment was affirmed by the Appellate court. In that case the mother died when the child was two years old and the father placed his infant daughter with the Porters. He contributed to her support for a period of about six years. father then moved to Kansas and due to ill health was unable to further provide support. When the father suggested that he would find another home for the child in Kansas, the her without expense until she was Porters agreed to keep grown up. The Porters kept the daughter for more than two years under that agreement. Then the fathor remarried and sought custody of the child. There the court said at pp. 197-199:

"In controversies of this character, three matters are to be regarded: the rights of the parent, the rights and interests of the person or persons to whom the care and custody of the infant child has been given by the parent, and the welfare of the child; and of these three the last

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mentioned is the matter of primary and paramount importance. The father is prima facie entitled to the custody of his minor child, but he may forfeit the right by misconduct or voluntarily relinquish it. If he, by agreement, surrenders the custody of his child to another, such surrender is not absolute and irrevocable; but, if a contention arises in the courts with reference to such relinquishment, much will depend upon the characters and habits of the contending parties, the fact whether the reclamation is sought within a short time or after the lapse of years, and the circumstances of the particular case. All other considerations, however, will be subordinated to the interest and welfare of the child.

"It appears from the evidence in the record before us that Mr. and Mrs. Porter are very worthy people and have taken excellent care of the little girl, and have great affection for her and are unwilling to part with her. The affections of the little girl are attached to them by bonds equally strong; she is happy and contented where she is, is desirous of remaining there, and to tear her away and send her to a distant State, and among strangers, would be a severe shock to her feelings, and might and probably would be a sacrifice of her future happiness.

"We do not agree with counsel for appellant that the wishes of the child, on account of her tender years and immature judgment, should not be considered by the court; she is a bright, intelligent girl eleven years of age, and is the person whose welfare is most deeply involved in the litigation, and it is but just that her wishes and feelings should be consulted, although, as a matter of course, not necessarily allowed to prevail.

"Where she is, her wants are all provided for, and her education is not neglected. It is true that the relator is her father, and the ties of blood should not be disregarded. It must be remembered, however, that she has been separated from her father since she was two years old, has seen him but seldom for many years, and that he is almost a stranger to her \* \* \*.

"\* \* \* He voluntarily gave the custody of his daughter to another, and even if this was more from necessity than choice, yet the facts remain that he has been separated from her for years, and that through his procurement, new ties, affections and interests have arisen, and his parental rights should not now outweigh all the other weighty considerations at stake."

We think that the law as enunciated in the <u>Porter</u> case is peculiarly applicable to the facts in this case and holding, as we do, that the Hurtts voluntarily relinquished the custody of Dorothy to the Conklins under an agreement whereby the latter undertook to raise the child at their own expense until she completed her education, the matter of controlling importance in this case is whether the interests and welfare of the child

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would be better served in the Conklin home or in the home of her parents.

unwholesome atmosphere of the Hurtt home but even though their home were less turbulent and less "Like a hell", as Marks Hurtt described it, her parents would not be entitled to her custody. They voluntarily relinquished the custody of Dorothy to the Conklins and thereby through their own procurement permitted her to be raised practically from infancy by defendants and to form home associations and ties of love and affection which could not be severed without marring the happiness of the child. Such ties could not be broken without great harm to the child and great pain to the child and the Conklins who had expended their time, love and money upon her. It was only natural that Dorothy, having lived with the defendants for more than soven and one half years, became attached and devoted to them and they to her.

Here we have a fourteen year old girl who was on the threshold of young womanhood virtually uprooted from the Conklin home where she was comfortable, happy and contented and living amongst congenial surroundings and compelled against her will to live in her parents' home, where she was continuously unhappy and emotionally upset. Her mother brusquely repulsed her repeated tearful requests to be returned to the Conklins. Mrs. Hurtt was not primarily concerned with the future happiness and education and the hopes and aspirations of Dorothy. Her position was and is simply that she was Dorothy's mother and Dorothy was her daughter and therefore she was entitled to her custody, even though it might blight her child's life to be compelled to remain in her home. If the statement in plaintiffs' brief that Dorothy is "a prim little prude" is any criterion of her mother's love and

would be better orred in the conditioned or in the home of her parents.

It is unmoverably to repeat the evilues showing the un helegome atmosphere of the unetthous but even should the short here that here were held the outsides the same that a continue the describe over the perents rould not as entitle to her caseat, the continue of the caseat, the molinguished the caseat of of the caseat, the molinguished the caseat of production the first test of the califies of the caseat of the same to the same production permits and the first of the caseat of the same that as the same that and the same that and the same the same that and the same that the same of the same the same that the same the same the same that the same the same the same that the same the same of the same that the same that and the same the same that the same that the

threshold of pound wareallook virevity varoeth from the tireshold of pound wareallook virevity varoeth from the Confidit home where the wese a nivership, half and contented and living alongst congenial source hadings and compelled against her will to live in her parents! home, there are was continutered in her rejected to antiture repulsed her rejected to antiture repulsed her rejected to antiture repulsed her rejected to antiture functions. Let the future happing a can education and the hopes and aspirations of Darothy, her position was and is shoply that she was she was entitled to her custody, even though it might blight her child's like to be compelled to romain in her home. If the statement in plaintiffs, brief that Dorothy is "a pribatic the statement in plaintiffs, brief that Dorothy is "a pribatic prude" is any criterion of her mother, slove and

affection for her, then this child should certainly not be subjected to Mrs. Hurtt's custody.

opportunity of evaluating both homes and under the law and the facts and circumstances in evidence her understanding and considered preference to remain with the Conklins was entitled to considerable weight. That the trial judge ignored the attitude and wishes of Dorothy is evidenced by the following excerpt from his opinion: "After all, no matter what she wants, Marks Hurtt and his wife have custody of the child, if they have done all they could, and I believe they have given her and the other children the best they could, under the circumstances." There is no question in this case as to whether the Eurtts did all they could for the other children. They did not do anything at all for Dorothy since she was six years old, when by their own procurement they had the Conklins take her into their home to raise.

As we view the decree of the trial court, it regarded nothing but the strict legal right of the parents and discarded as immaterial the circumstances under which Borothy was brought into the home of the Conklins and kept and cared for by them since she was six years old. The trial judge failed to give proper consideration to the fact that all that borothy knew of home and family ties grew up with the parental care bestowed upon her by the Conklins and he also failed to give proper consideration to the attitude and wishes of Dorothy who was of an age and capacity to make a sensible choice between the respective homes.

This case is peculiar and unusual in that Mrs. Hurtt does not even claim that Dorothy's interests and welfare will be best served if she is given her custody. Although Dorothy was originally turned over to the Conklins so that she would affirsting for her, its side side some or being not be antipulation of antipulation of antipulation of antipulation.

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This cape is peculiar and unusual in that its. North does not even claim that Dorothy's interests and welfare will be best served if she is given her castody. Although Porothy was originally turned over to the Conklins so that she would

receive advantages that she could not possibly have in the Hurtt home. Mrs. Hurtt wrote the Conklins in July and August, 1943 after she had refused to return Dorothy to them, that she did not want Dorothy to have any more advantages or consideration than her other children were receiving in her own home. On June 30, 1943, two days after Mrs. Hurtt brought Dorothy to Geneva, Ohio. Marks Hurtt wrote the Conklins that his wife said to him that "if things dont turn different up there with Bill not Respectin Betty & children & Phylles she was not going to Let Dorthey come Back." When Mrs. Hurtt was interrogated on her crossexamination as to whether she made this statement to her husband she did not deny making it. Thus it appears that instead of considering Dorothy's future welfare she subordinated same to her desire to "get even," as it were, with her son Bill and the Conklins and to punish Dorothy.

In People v. Weeks, 228 Ill. App. 262, the child's mother died shortly after her birth and thereafter when she was about two years old her father turned her over to his sister to raise without any definite arrangement as to her custody. The child remained with her father's sister until she was twelve years old and in eighth grade at school. Then the father who had remarried instituted a habeas corpus proceeding to secure the custody of the child. In that case the judgment order of the trial court was reversed and the cause was remanded with directions that the child be remanded to the custody of her aunt. There, after reviewing numerous authorities on the subject, the court said (p. 271) that "notwithstanding the seemingly rigorous expression of the law as it is set forth in the statute, the court may, in determining the right of a parent to the custody of his child, give greater heed to the welfare of the child than to the

receive advantages but and could not joinful neve in the Murtt has an anifero out story than and .sar a thur uguat, 1543 efter and had reduced to revers lovothy to them, that she will not want erothy to rave my none advantages or somederefich than her other shillbren nere receiving in her own home. On June 3. 19.9, 0.0 days ofter rs. Turkt brought borothy to Comeve, Oife, Frie Chritt wrote the Conkinn that his wife sail to will that that "if things font our wifer not up throat life with the against Petty & similar is smaller and each as the companies of the come Back, ' han Mrs. North was interrugated on her crossref of incretate while other and reffects of the moliferingro hasband she did not dray maidre it. Thus it so cars that instead of considering coolers father selfers she subordinated stage to her to star to 'got even, a as it were, with her son Bill and the Jon'dlas and to panish Porothy.

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natural right of the parent; in other words, although the parent is morally and pecuniarily fit, if it appears reasonably certain, considering all the circumstances, that it would be better for the welfare of the child that it should remain with a third person, the parent's natural rights must give way."

A careful analysis of all the evidence in the record compels the conclusion that Martha Hurtt was a domineering woman, that she was the dominating force in her family, that she was principally responsible for the unpleasant, unhappy and unwholesome atmosphere of her home and that she was tempermentally unfit to have the custody of Dorothy. As to Marks Hurtt it is sufficient to say that his own letters recognized the right of the Conklins to the custody of Dorothy until she completed her education and said letters also recognized that the child's interests and welfare would be best served by remaining in the Conklin home.

We are impelled to hold that the trial court erred in awarding the custody of Dorothy Ellen Hurtt to her parents and for the reasons stated herein the judgment order of the Superior court of Cook county is reversed and the cause is remanded with directions that Dorothy Ellen Hurtt be remanded to the custody of Florence B. Conklin and Nellie M. Conklin and that the complaint of plaintiffs, Marks Hurtt and Martha Hurtt, be dismissed.

JUDGMENT ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

natural right of the partney in other words, although the purent is morelly and pecuniarily fit, if it appears reasonably certain, considering all the circuestances, that it would be better for the welfare of the shild that it cloud repain with a third percon, the parents on the rather say, "

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## APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

328 I.A. 315

OCTOBER TERM, A. D. 1945.

Alexander Haddad, as Administrator of the Estate of Mary K. Haddad, deceased,

Appellant,

vs.

George Marble and Mary Marble, Appellees. Appeal from Circuit Court, Winnebago County.

WOLFE, -- P. J.

On March 27, 1944, Alexander Haddad, as Administrator of the Estate of Mary K. Haddad, deceased, filed a petition in the Probate Court of Winnebago County, praying for a citation against George Marble and Mary Marble to require them to answer certain interrogatories to be propounded to them concerning certain household goods and property which the petition alleged belonged to the Estate of Mary K. Haddad, deceased. The property consisted of household goods in a rooming house of 21 rooms. The furniture in each room is described in detail in the petition.

It is further alleged in the petition that the Marbles have in their possession, all of said property, and refuse to

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It is further alloyed to the patheton that the hardes have in their possession, all of said property, and refrese to

turn it over to the Administrator of Mary K. Haddad, deceased. It is also alleged that they have collected, at various times from the tenants of the rooming house, large sums of money to-wit, \$4,000.00, which they have in their possession, and control, or have embezzled the same; that the same money belongs to the Estate of Mary K. Haddad, deceased.

A citation was issued and the respondents, George Marble and Mary Marble filed an answer to the petition in which they admitted they had in their possession, the household goods described in the petition, and admitted they had refused to deliver the same to the petitioner, but denied that the deceased was the owner of the property at the time of her death. They also denied having in their possession any money that belonged to Mary K. Haddad at the time of her death.

Upon a hearing in the Probate Court, an order was entered finding the issues for the respondents, and that they did not have any property in their possession belonging to Mary K. Haddad at the time of her death, and at the time of the hearing did not have any property belonging to her estate. The Court dismissed the petition at the costs of the petitioner.

The petitioner perfected an appeal to the Circuit Court. A trial denovo was had in that Court. The cause was submitted to the Court for determination, which resulted in a similar order, finding that the petitioner had failed to prove that the property described in the petition, was an asset of the estate of the decedent at the time of her death. The petition was dismissed.

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From that order, an appeal has been prosecuted to this Court.

The errors relied upon for reversal, are as follows:

1. The Court erred in finding the issues for the respondents.

2. The Court erred in admitting immaterial and irrelevant evidence over the objections of Petitioner-appellant. The appellant has not seen fit to argue the second assignment of error, so the same is waived, leaving only a question of fact to be decided by this Court.

There is no evidence whatsoever, to sustain the charge of the petitioner that the appellees had \$4,000.00, or any other sum of money in their possession, which had belonged to Mary K. Haddad at the time of her death.

The evidence shows that Mary K. Haddad purchased the property in question, from one, John A. Thomas and then Mrs. Haddad rented the furniture to the Marbles. It appears from the evidence that James Haddad was the husband of Mary Haddad, and that until sometime in 1936, they resided at Rockford, Illinois, after which time James Haddad lived in Chicago. James Haddad started to collect the rent on this property sometime during the year 1936. Sometime during that year, James Haddad and Mary K. Haddad were divorced and about 6 months later were remarried. During the time that they were divorced, James Haddad collected the rent from the Marbles and gave receipts in his own name for the same, and this procedure continued up until the time of the death of Mrs. Haddad. According to the testimony of Mr. James Haddad, he turned all payments

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Illinois, after which the same include it, a cent or this property for ethes during the year little. I are the time from the theory are excepted at a trying the year little. I are the from that they were sent as the income and the fact of the time they were divorced, fence hand collocted the gent from the large were divorced, fence hat it is own name for the same, and this procedure continued up until the time of the death of hre. Hadded. According to the testiment of the tastiment all payments

that he received, over to Mrs. Haddad. The payments were mailed to James Haddad in Chicago, and he in return, (so he claims,) sent the money back to Rockford to Mrs. Haddad. The evidence further shows that he continued to collect from the Marbles after Mrs. Haddad died, and so continued for several years after the administrator had been appointed in Mary Haddad's estate.

on September 26, 1939, James Haddad entered into a written agreement whereby he confirmed a verbal discussion in reference to the sale of this property to the Marbles, the sale price being \$2,500.00. By the terms of the sale, after paying all bills such as rent, light, heat and water, all of the remaining income from the property was to be paid to James Haddad. In no event the payments should be less than \$40.00 per month. The Marbles paid various amounts until Nov. 15, 1941, when Mr. George Marble wrote to Mr. Haddad in Chicago, informing him that the purchase price on the contract had been reduced until there was only \$91.00 plus, due on the contract; that he wished to make this final payment in person, and get the bill of sale that was promised him for the goods.

On Nov. 18, 1941, Mr. Haddad wrote the Marbles acknowledging the receipt of the letter of the 15th, but advised the Marbles that his attorney insisted that there never was a sale, and that the letter in the Marble's possession is not a bill of sale, and that he would be in Rockford within a short time to talk to the Marbles further on the subject.

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On Nov. 19, 1841, Ar. Madden wote the Marbles asknowledging the reactipt of the letter of the little, bus advised the Marbles that his atternsy insisted that there were was a sale, and that the letter in the Marble's possession is not a bill of sale, and that he rould be in Nockford within a short time to talk to the Marbles further on the subject.

An examination of the abstract and the additional abstract shows the payments which the Marbles made to James Haddad. He states in his testimony that he turned this money over to Mary Haddad shortly after it was received by him. this is so, she certainly had notice that these payments were not the ordinary payments for rent for the premises in question. If Mary Haddad were really the owner of these furnishings, it seems strange that James Haddad would collect the rents, etc., from the Marbles after he and his wife were divorced. It also seems unreasonable that he should continue to collect the payments from the Marbles after the death of Mary Haddad, and especially so, after the administrator had been appointed to take charge of the estate; also strange that no effort has been made for the return of the money paid to James Haddad since the death of his wife. We agree with the trial court when he states: "So, it seems to me, in view of the making of the lease, in view of the sale, that can't be disputed, that the petitioners have failed to prove, by a preponderance of the evidence that the title was in Mary Haddad at the time of her death. All the inferences that can be drawn, from the written documents filed here lead to that conclusion and the acts of James Haddad certainly lead to that and there is a reasonable inference that if Mary Haddad knowingly consented to the transfer of this lease or the releasing of it to the respondents, that she knew everything that was going on and consented to the leasing of this property to the respondents."

Langulapha or and court do the lo delignings of abstract along the jagments which the Marbles made to James. haddai. We abubo di had readhread war'i he baare di kebana ిక్ .మమ్లు నైకే మంగామణకులు ఇంటు నైట్ ఇంకేషుకు స్టమ్లుకున్నారు. ఈ ముఖ్యాలో, తనే ఇంశార this is so, and contributed but notates that caree paymonth were not the crelinary jaymenet is a rest for the join see our question If Herry Histard were usefully as concernor security all the same reena sursume that James included a lot collable live and es, evel, . During the grown of the and the value of the ability of a 10 more pesto are especificable back for a complete consist in the consistency of The second of the particle we distribute the control and the second التسار باشأ الفالها كالمثأ especially so, after the administration is find, in the son ్జరు, రాజ్లుకోర్కా గుండ్ మీ దోశా ఇం మాండుకు అట్టి. కథాంకి దేశంక ఈ ఓ కుండ్ అనైకాకుంటేంది. తిరుకున్ని been made for the return of a contract of the contract of the since the letter of the street with a this could be street when is stable, this, at acous to m, is then it out that it the lease, it which of the rile, have on it be harded, dare the polationers is volidited to prove to a preparameter of write of the paper of the compatite and first a section of on and the doctor of the ferences and one term, the act written documents filed hore list to Witt orrelative one the sots of dance in tank or beel plintages helen to each to etos reasonable inference that II lary Indial Gordan ly consented to the transfer of this lease or the relecting of it to the respondents, that she knew everything that was going on and consented to the leasing of this property to the respondents.

The Judge of the Probate Court, and the Judge of the Circuit Court saw and heard the witnesses testify in this case, and they were in a much better position to test the credibility of these witnesses than a Court of review. The law has committed to the trial judge, where a cause is tried by the court without a jury, the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting the Appellate Court will not substitute its judgment for that of the trial court.

From a review of the evidence in this case, it is our conclusion that the petitioner failed to prove by the greater weight of the evidence, that the estate was entitled to the property in question. The order dismissing the petition of appellant is affirmed.

Affirmed.

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1946

Appeal from Circuit Court of Rock Island County

328 I.A. 316

FRED S. RICHCREEK,

Plaintiff-Appellee,

VS

CITY OF ROCK ISLAND, a Municipal Corporation,
Defendant-Appellant.

Bristow, J.

This appeal is from a judgment rendered upon a verdict of a jury returned in the Circuit Court of Rock Island County, in favor of plaintiff Fred S. Richcreek, appellee, against the defendant, City of Rock Island, a municipal corporation, appellant. The verdict was for \$10,000.00. A remittitur was ordered by the trial court and judgment was entered in the amount of \$7500.00.

The plaintiff received personal injuries from a fall sustained while he was walking morth on a brick sidewalk on East 25rd Street in said city on the evening of December 1, 1940.

The complaint charged that the side walk was out of repair at the place of said fall in that it had large holes, depressions and broken places; that the city had permitted ice and snow to accumulate, causing hills, depressions, fills, holes and uneven places in said snow and ice; that plaintiff stepped, walked or slipped into said hills, holes and depressions and was thereby violently thrown to the ground receiving a spiral fracture of his right leg between the knee and ankle.

The ity of Rock Island contends that the condition which caused the addident was due to/slippery surface resulting from snow and ice, and

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hat such does not constitute actionable negligence. Appellant further contends that the verdict is manifestly against the weight of the evidence.

Plaintiff Richcreek testified that the brick sidewalk upon which he walked to the place where he fell was smooth, and about the same as concrete; that, when he came to the place of the hole which was about 5 inches deep and 12 to 14 inches wide, all at once his foot stepped, slipped or went into a hole or caught on an obstruction there; and that he fell forward, breaking his leg; that he lay there unable to srise for about five minutes. He was picked up by three men he called, and was carried on the back of one of them across the street. He stated there was a slight skift of snow on the ground; that he had no knowledge of the depression or hole; at that he saw the place later when there was no snow.

A witness who had passed over this walk for many years likewise described the condition. He said that across this walk were two deep tracks where the bricks were pressed down into ruts because of vehicles having been driven over the walk. He said that on the west side or street side of the walk, the depressions were five to six inches deep and twelve to fourteen inches wide, tapering to the east side of the walk; that the beginning or deep part of the north rut was about a foot from a tree, which was the location of the plaintiff's fall. This witness testified that he saw the place shortly after the accident; that this walk had been cleared of snow; that there probably was a little ice and snow there but he did not know how much. Another witness who lived close by sai that the depressions had been made because of loaded coal trucks from the street crossing the walk to the east, and that there were ruts which

For the defendant, a police officer testified that the place was smooth; that the defect was covered with ice and snow. A number of officer of the city testified. One testified that he didn't notice or observe any holes or ruts in the sidewalk except that he noticed a little hump over the roots of a tree. Another police officer said he didn't notice. Any any depression or any ruts in the sidewalk. Still another witness testified that the following day there were askes there, and that the hôles were

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hat such loes not constitute softenbyble need grave. Ameddant further ontends that the verdict is wrifestly eyellst the addition the endiance.

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 filled with ice and snow. We do not find in the record any testimony as to wheher there was any further snow fall the night after the accident, whether the ashes were put on afterwards, or whether there was any change in the condition of the walk. There was a sharp conflict between the evidence offered on behalf of the appellee and the appellant pertaining to the condition of the sidewalk on the date of the alledged occurence. It was peculiarly within the province of the jury to determine where the prepanderance of the evidence lay. We do not believe the jury's determination of this issue in favor of the plaintiff should be disturbed. Mueth vs Jaska 302 Ill.App. 289, 294; Emge vs Illinois Central Railroad Company, 297 Ill. App. 344; Adamsen vs Magnelia, 286 Ill. App. 412, 421. There may be liability because of defects or obstructions on a walk, and there may also be present additional hazards, such as snow and ice which join in causing an injury. Bibbins vs City of Chicago, 193 Ill. 359, 381; Richmond vs City of Marseilles, 190 Ill. App. 227; City of Chicago vs Chase, 33 Ill. App. 551; Lucking vs City of Sedalia, 167 S.W. (Missouri) 1152, 1153.

Defendant contends that the verdict of the jury and judgment is grossly excessive. The undisputed testimony shows that the plaintiff was a plumber whose earnings had been as high as \$4500.00 a year up to five months before the date of the accident. Six months after the accident he attempted to work. After trying to work for three days, a knot appeared at the break of the leg. The skin broke at this point, and serum and pus was diswharged. Mr. Richcreek's leg was again treated, elevated and a hip cast was placed on him which remined for seven weeks. he began working s teadily the following October. Since the he has not been able to perform the heavy duties in his business which he had performed before the injury was received. During the treatment, several screws were inserted to hold the various parts of the fractured leg in place. He was in a hospital in Rock Island for 13 days where braces and a cast were placed on the broken member. And later, in April, he entered Cook County Hospital for further treatment which lasted six days, and during which time three of the screws were removed. One of the screws broke and still remains in the leg. Richcreek suffered

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uch pain, and at the time of the trial, three and a half years later, its leg was still causing him trouble. The hospital and doctor bills were \$230.00.

Instruction No. 2 given on behalf of the plaintiff, advised the jury that the law required the city to use reasonable care to keep the public sidewalk at the plate in question in a reasonably safe condition for the safety of persons passing ove the same. The appellant claims that the abstract instruction is misleading, and that the giving of it is reversible error. Defendant in its instructions No. 13 and No. 14 tendered and given advised the jury of the same duty. Instruction No. 2 was not a directory instruction. The jury was very fully instructed in this case. Instructions are to be reach as a series. Where a defendant in its tendered instruction asks the jury to be instructed in a like manner as in an instruction given for plaintiff, such defendant cannot complain of plaintiff's instructions. Jones vs Standerfer, 296 Ill App. 149; McInturff vs The Insurance ompany of North America, 248 Ill. 92, 99.

Appellant contends that the trial court erred in not granting a new trial because it was discovered after the verdict that one of the jurors had been convicted of grand larceny and had not been restored to his legal rights. This fact was not known to defendant's attorney until two days after the verdict was returned. The record does not show any questions were propounded to this or any juror on the voir dire. There is no contention that this juror was asked concerning such and make false answers to interposatives. Appellant contends that under Section 7, Division II of the Criminal Code of Illinois, such convicted person was thereby rendered incapable of serving as a juror. Appellant cites and quotes numerous cases of foreign jurisdiction some of which so hold and some of which hold contrary to the ruling of the courts of appeal of Illinois.

Appellant contends that by virtue of the Common Law Rule, this juror was subject to challenge by propter delictum on account of criminality, and that whether attempt was made on the voir dire to learn of such conviction is not material, but that such fact afterwards discovered demands reversal.

Appellee cites many cases from foreign jurisdictions holding to

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Appellant contents that by mirtue of Er Vorent Leving, thing were subject to the lense of project to subject to the lange of relating that whether attempt were made on the voir dire to length of auth courteding interial, but that auch fact afterwards discovered decembersals.

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the contrapy. It would unduly lengthen this opinion to discuss such cases individually. We believe, under the law of Illinois, if a party calls to make an inquiry on the voir dire, he may not successfully remest a reversal because of later acquired knowledge.

In Raub vs Carpenter, 47 L. Ed. 119, 187 U.S. 159, the statutes of the istrict of Columbia provide that for qualification of a juror he must never have been convicted of a felony or misiemeanor involving moral turpitude. This was a Civil case. One of the jurors had several times been convicted of larceny. Motion for a new trial had been denied. The court said that it was within the discretion of the trial court to grant or deny a new trial. At page 192, the court said that "No reason is perceived why this particular objection could not be waived by the parties, and even where a party might be entitled to claim that he had not waived it, that would go to the merits on application for new trial and not to the want of power." The same rule of discretion is held by the courts of Illinois. Mutual Life Insurance Company vs Allen, 113 Ill. App. 30, 98, affirmed in 212 Illinois Supreme Reports, 134, 141.

In Chase vs The People, 40 Ill. 352, 358, the court refused reversal of the judgment on the complaint that one of the jurors was an alien, and said, "It is the duty of the parties to ascertain, by proper examination, the competency of the jurors." In <u>Swarnes</u>, <u>Admx</u>. vs <u>Sitton</u>, 58 Ill. 155 two jurors had decided two former cases against the defendant. Defendant's attorney, who had been in those cases, had forgotten that such jurors had served and so decided. The court said that it was the duty of the attorney for the defendant to recollect such fact, and that the consequence of such forgetfulness should not be visited upon the plaintiff. In <u>Byars</u> vs <u>City of Mt. Vernon</u>, 77 Ill. 467, 470, the Court said, "Aparty will not be permitted to accept a joror without any examination as to his competency, and afterwards set aside the verdict because the juror did not possess the requisite qualifications, this would be to trifle with the forms of the law."

In State vs Keziah, 110 L.A. 11, 34 So. 107, the foremen of the jury was under indictment. This juror was not asked if he was charged

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with or had been convicted of a misdeanor or felony. Neither the defedant nor his attorney knew of the indictment until the jury had returned a verdict of murder. That court said, "The rule is stringent that a defendant, if he has not interrogated as to qualification of jurors, cannot take advantage of knowledge learned after verdict."

In Kohl vs. Lehlback, 40 L. Ed. 432, 160 U.S. 293, the fact that a juror was an alien was not learned until after the verdict. This was due to the negligence of the defendant's attorney in not so learning. It was there claimed, as claimed here, that the Common Law right of trial by jury had been violated involving infraction of the Consititution. The court held to the contrary and refused to reverse the judgment. In the Kohl case, the court approved the case of Chase vs The Beople, 40 Ill. 352, Supra, and pointed out that it had overruled earlier Illinois decisions. The above requirements are recited in many cases which are quoted and cited in State vs Pickett, by the Supreme Court of Iowa, 73 N.W. 346, 347.

Since appellant has not shown by the record that it made any attempt upon examination of tendered jurors for examination, to learn the qualification of this juror, it cannot now complain because of such later acquired knowledge. To hold otherwise would be an inducement to litigents to refrain from determining qualifications of jurors until a party might first find how a jury had decided the issues.

Finding no error in this record, the judgment of the Circuit Court should be, and accordingly is hereby affirmed.

JUDGMENT AFFIRMED.

n or had been convicted of a misdesnor or follow. Maither the defedent his efformey knew of the indictment until on jury his returned a vert of murder. That count said, "The rule is stringent that a degralant, he has not inferrogated as to qualification of jurons, connect two simpless of knowledge learned of the resulter."

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IN THE APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND DISTRICT
OCTOBER TERM, A.D. 1945

328 I.A. 316<sup>2</sup>

PETER McGOVERN, ANNE BURR, ELLEN FOX, KATE McGOVERN and ELIZABETH MURPHY, PLAINTIFFS-Appellants,

v.

JOSEPH W. McGOVERN, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JAMES W. McGOVERN, DECEASED, MARGARET MARIE MGGOVERN AND REV. FRANCIS GARRITY, Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF WILL COUNTY.

Mr. Justice Dove delivered the opinion of the court:

James W. McGovern died on June 11, 1943, leaving an instrument dated June 4, 1943, purporting to be his last will and testament, which was admitted to probate by the probate court of Will County on September 11, 1943. By its terms it directed the executor to pay Rev. Francis Garrity \$100 for high masses, and the remainder of the estate, after payment of debts and funeral expenses, was devised and bequeathed to Margaret Marie McGovern, styling her as "my beloved niece."

On March 28, 1944, appellants filed a complaint in the circuit court of Will County to contest the will, on the ground of mental incapacity and undue influence, alleging themselves to be cousins and next of kin of the decedent, and on April 29, 1944,

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On March 25, 101s, we ellaws filed a complete in the circuit court of 111 County to come to the will, or the ground of mental incapacity and undue influence, elleging themselves to be cousing and next of Min & V.- Geoedent, and on April 28, 1844,

appellees filed their separate motions to dismiss the complaint on the ground that the allegations fail to state facts sufficient to entitle the plaintiffs to relief, but are vague, uncertain, indefinite, and contain mere conclusions.

On May 6, 1944, the trial court entered the following order:

"The motions of the defendants to dismiss this cause are called up for hearing in pursuance of the previous order of this court but no one appears for the plaintiffs, and the court sits and hears said motions and being now fully satisfied in the premises it is ordered by the court that said motions be and are now allowed, and that this cause be and is now dismissed at plaintiffs! costs."

No notice of appeal from the order was filed within the statutory ninety days, and in apt time, a petition for leave to appeal was filed in the Supreme Court, but no freehold being involved, the cause was transferred to this court. (McGovern v. McGovern, 390 Ill. 516). The petition was granted by this court, and notice of appeal was filed on June 25, 1945.

It is insisted by appellees that the order of May 6, 1944 is not a final appealable order. It is well settled that an order which merely dismisses a complaint, or dismisses a complaint at the plaintiff's costs, is not a final appealable order, and that to be final, an order should adjudge that the plaintiff take nothing by the writ and that the defendant go hence without day, or words of equivalent meaning. (Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200; Board of Education v. Board of Education, 301 Ill. App. 228, 229 Prange v. City of Marion, 297 Ill. App. 353,356, 357). A general definition of a final and appealable judgment or decree is found in McDonald v. Walsh, 367 Ill. 529, 533, where the court said: "A judgment or decree is final and reviewable when it terminates the litigation on the merits of the case and determines the rights of the parties. (Citing cases.) elements An order has the essential nof finality when, if affirmed, the

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trial court has only to proceed with its execution." In discussing this general definition, the court said in the recent case of Brauer Machine and Supply Co. v. Parkhill Truck Co., 383 Ill. 569, 574; "While this general definition is well settled, and ordinarily applicable, as expressing the meaning of those words, nevertheless they are not always used in this restricted sense. The final decision from which an appeal lies does not necessarily mean such decision or decree, only, which finally determines all the issues presented by the pleadings. It may, with equal propriety, refer to the final determination of a collateral matter, distinct from the general subject of the litigation, but which, as between the parties to the particular issue, settles the rights of the parties. Such an order is final and appealable."

In Mutual Reserve Fund Life Ass'n. v. Smith, 169 Ill.

264, 265, it is said in the opinion: "A final judgment means,
not a final determination of the rights of the parties with
reference to the subject matter of the litigation, but merely
of their rights with reference to the particular suit. It is

atall
not necessary that the judgment should be upon the merits, if
it definitely puts the case out of court. It is the termination
of the particular action which marks the finality of the judgment.

As judgment of non-suit or dismissal is final." This case has
been frequently cited with approval by the Supreme Court, down to
and including Brauer Machine and Supply Co. v. Parkhill Truck Co.,
383 Ill. 569.

The order in the case at bar did not merely dismiss the complaint, but dismissed the cause at the cost of the plaintiffs. It terminated the rights of the parties in the particular suit, and definitely put the case out of court, as effectively and with the same result as if the order had specifically adjudged that the plaintiffs take nothing by the writ and that the defendants go hence without day. Being of the same force and effect as such

trial court has only to proceed with its aboution. In its oursing this general definition, the court said in the recent case of Brauer Recline and Supply Co. v. Fashhill Teach Us., 585 II. 559, 574; "While this answel definition in sell settled, and ordinarily seplicable, as every sing. ... meaning of those words, nevertheless they we set singulated in this restricted sense. The final decision from twich an appeal that does not necessarily near such decision from a which an appeal that finally determines all the teachers product to be the place. It may, when equal enoprisely, without the collection of a collection, but except in the prince of a collection, but except as because of a collection, but except as because of the prince of the prince of the collection and appeals of the figure.

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It terminated the rights of the porties in the particular suit, and definitely put the case out of sourt, as effectively one with the same result as if the order had specifically adjudged that the plaintiffs take nothing by the crit and that the deformants go hence without day. Being of the same force and effect as such hence without day. Being of the same force and effect as such

an order it is manifestly equivalent thereto. There was nothing further to be done, and if the order be affirmed, the court would have only to proceed with its execution in enforcing the payment of the costs. The order is a final and appealable order.

The remaining questions are whether the allegations of the complaint sufficiently charge mental incapacity of the testator, and undue influence. The allegations as to mental incapacity are as follows:

"That the said James W. McGoverp, at the time of the signing of said instrument in writing, purporting to be his Last Will and Testament, was not of sound mind and memory, but on the contrary was in his dotage, was suffering from uremia and other diseases, and his mind and memory were so impaired as to render him wholly incapable of making any just and proper distribution of his estate."

The law assumes that all adults are of sound mind until the contrary is proven. (Grosh v. Acom, 325 Ill. 474, 491). Mere eccentricity does not constitute unsoundness of mind. Age, sickness or debility of the body does not affect capacity to make a will if the testator has sufficient intelligence remaining to make a will. (Hoskinson v. Lovelette, 365 Ill. 21, 27). The fact that certain relatives are excluded without any reason therefor, or because of prejudice, does not indicate want of mental capacity, if such does not amount to an insane delusion. (Quathamer v. Schoon, 370 Ill. 606, 608). But the law requires a testator to know what he is doing, what property he has, who are the natural objects of his bounty, what disposition he wants to make of his property, and to be capable of understanding the nature and effect of executing his will. (Hoskinson v. Lovelette, 365 Ill. 21; Anlicker v. Brethorst, 329 Ill. 11, 20).

In the Anlicker case the trial court refused an instruction offered by the contestants on the question of mental incapacity by reason of insane delusions. The proponents contended that the action of the court was justified on the ground that the bill filed contained no allegation to that effect. Overruling the contention,

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The Supreme Court said in the opinion: "It was not necessary for the bill to name specifically the particular kind of unsoundness of mind nor the cause of mentalunsoundness. These are matters of evidence and need not be alleged." (Citing American Bible Society v. Price, 115 Ill. 623; Snell v. Weldon, 243 Ill. 496).

In the American Bible Society case, the court, in passing upon the sufficiency of the allegations to contest a will, said at page 635 of the opinion: "The bill, it has been seen, charges that the testator had become, and was at the time of the making of the will, of unsound mind and memory, thus, in effect, simply putting in issue his testamentary capacity, which, by our statute, is defined to be that of being of a prescribed age, and of sound mind and memory. The only material question. manifestly, under this allegation, was whether the writing produced was the product of an unsound mind and memory. The specific name applied to describe that unsoundness, the means whereby the unsoundness was caused, or how it came about that the unsound mind and memory caused this writing to be drawn and signed, were matters of evidence that need not be alleged, and, if alleged, need not be proved. " This holding is quoted with approval in Snell v. Weldon, 243 Ill. 496, 530, and the court held in that case that where the bill charged that the testator was of unsound mind and memory, a further allegation that he had an insane delusion in regard to his son, was merely an amplification of the main charge, or a pleading of evidentiary facts.

In Dietzel v. Pozen, 278 Ill. App. 89, relied upon by appellee, the allegations of the bill as to mental incapacity were that at the time of the execution of the instrument testator was not of sound mind and memory but on the contrary was at the point

The Supreme Gourt said in the opinion: It as not seen tany for the bill to heme specifically the critical description of uncountness of mind nor the course of the industrial area. These are natures of evidence of ancel of the course of the

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of death by reason of some malignant disease, the exact nature of which was unknown to the complainant and his mind and memory were so impaired as to render him wholly incapable of making any just and proper distribution of his estate. The allegations were similar to those in the instant complaint except that in the Dietzel case it was alleged that the testator was at the point of death by reason of some malignant disease, the exact nature of which was unknown to the pleader, and there was no allegation that the testator was in his dotage. The court in its opinion quoted the first part of the holding in the American Bible Society case, supra, but omitted the last sentence and held that there was no sufficient allegation in the bill that the purported will was the product of an unsound mind and memory. We are unable to agree with that holding. The allegation as to mental incapacity, in the instant case, specifically charges that James W. McGovern, "at the time of the signing of said instrument . . . . was not of sound mind and memory, but on the contrary . . . his mind and memory were so impaired as to render him wholly incapable of making any just and proper distribution of his estate." This relates specifically to distribution of his estate by the purported will, and in our opinion is a charge of mental incapacity to make a will.

Beginning in 1874, with Puterbaugh's Pleading and Practice, Chancery, substantially the same form of allegation of mental incapacity has appeared in that and similar works by Branson, Wermuth, and Edmunds, and have been considered by the bar as authoritative, and generally used.

In the work on Pleading and Practice under the Illinois Civil Practice Act, by Palmer D. Edmunds, former Commissioner of our Supreme Court, Vol. 3, (1940 Cum. Pocket Supp. page 23), the American Bible Society case, supra, and the Andlicker case, supra, are quoted, and in discussing the Dietzel case, it is said: "The Dietzel case appears to be an unwarranted departure from the ruling laid down

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in the space of the dispendence under the illimite Supreme Court, Vol. 5, (1940 Gum. Poaket Supp. page 25), the Arestean Supreme Court, Vol. 5, (1940 Gum. Poaket Supp. page 25), the Arestean Bible Society ones, suppe, and the Andlicher case, such, are quoted, and in discussing we Dietrel case, it is waid: "The Dietrel case appears to be an unwarranted deperture from the ruling laid down

by the Supreme Court. "

We are of the opinion and hold that the allegations as to mental incapacity are sufficient.

The allegations as to undue influence are as follows:

"6. That the defendant Joseph W. McGovern, Executor
herein, is the husband of Margaret Marie McGovern, the principal
legatee and devisee herein; and that the defendant Rev. Francis
Garrity is the son of Anthony J. Garrity, who is one of the two
attesting witnesses of said will, and also the person who drew
said will and attended to its execution.

"7. That the defendant Margaret Marie McGovern, the principal legatee and devisee herein, managed the property of the said James W. McGovern, deceased; and that there was a fiduciary relation and confidential relationship existing between the said Margaret Marie McGovern and James W. McGovern, deceased."

Marie McGovern used and exercised many undue acts and fraudulent practices and resorted to falsehood and misrepresentation and the improper withholding of true facts to induce the said James W. McGovern to execute said instrument of writing, and the said James W. McGovern, deceased, in executing the same, was in fact under improper restraint and undue influence from the said acts and practices of the said defendants Joseph W. McGovern and Margaret Marie McGovern."

The second paragraph of the complaint alleges that the decedent left as his heirs at law and next of kin, Peter McGovern, his first cousin; Anne Burr, his first cousin; Ellen Fox, his first cousin; Kate McGovern, his first cousin; and Mary McGrath, "now deceased," his first cousin, and the ninth paragraph alleges that the latter left the plaintiffs as her sole heirs at law. The purported will names Margaret Marie McGovern as "my beloved niece."

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If that be true, she would be his next of kin, to the exclusion of the plaintiffs, but the allegations of the complaint, admitted to be true by the motion to strike, exclude her as his next of kin.

In Pollock v. Pollock, 328 Ill. 179, 186, relied upon by appellees, the rule as to what constitutes undue influence is stated as follows: "Undue influence which will invalidate a will must be of such a character as to deprive the testator of free agency. It must be such as to destroy the freedom of the testator's purpose and render the instrument more the will of another than his own. Such influence must be directly connected with the execution of the instrument and operate at the time it is made, producing a perversion of the testator's mind, and it must be a speciesof fraud. Advice or persuasion will not vitiate a will freely and understandingly made. The influence resulting from love and affection, which does not seek to control the will of the testator, is not undue influence."

In Ryan v. Deneen, 375 Ill. 452, also relied upon by appellees, the will of Katherine Ryan left her property to her brother, Matthew D. Ryan, with a provision that if he predeceased her, one half was to go to Mary D. Deneen, a niece, absolutely, and the other half in trust for the benefit of her brother, Matthew R. Gregory, with a provision for remainder over to Mary D. Densen, in case he died before the testatrix. Both Matthew D. Ryan and Matthew R. Gregory predeceased the testatrix and Mary D. Deneen took the whole estate under the will. The allegation as to undue influence on the part of Mary D. Densen were similar to those of paragraph 8 of the complaint in the case at bar, except that the word "arts" was used in place of the word "acts." As to undue influence on the part of Matthew D. Ryan, it was alleged that he threatened the decedent by telling her that unless she made a will leaving everything to him, with remainder over as above mentioned, he would leave nothing to her; that she was of meek and humble character and controlled by Matthew D. Ryan, who was overbearing and dictatorial; that she acted only at the direction of Matthew D. Ryan, and that when the purported will was executed she was under the control of -8--8-

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Matthew D. Ryan.

In affirming the striking of those allegations the court said in the opinion: "It is not sufficient to aver undue influence as a conclusion, but facts must be stated warranting the conclusion and must go to the extent of showing the testator was thereby deprived of his free agency. (Ater v. McClure, 329 Ill. 519: Heavner v. Heavner, 342 Ill. 321). The all egation that the testatrix was under the control of Mary D. Deneen and Matthew D. Ryan and that the will was not that of the testatrix were mere conclusions of the pleader. (Heavner v. Heavner, supra). Furthermore, undue influence is that coercion which destroys the freedom of the testator and renders the instrument obviously more the offspring of the will of another, or other than his own." It was further held that the alleged threat was a mere statement that a reciprocal act would be withheld if the testatrix did not dispose of her property in the manner suggested, and imported an offer of a reciprocal devise if she made such a will, and amounted to no more than persuasion.

In the Heavner case, also relied upon by appellees, the court affirmed the sustaining of a demurrer to allegations relied upon to show undue influence. The allegations were that Frank Heavner was a brother of Bluford (the testator) and that Bluford relied upon Frank's judgment; that at the time of the supposed making of the instrument purporting to be his last will, Bluford was a man weak in mind and body, and Frank was a strong man of a dominating personality; that Bluford was under the control of Frank at the time he executed the instrument, and it was not the result of the free will and judgment of Bluford but was the result of the undue influence of Frank; that Bluford in executing the instrument was in fear of and under the intimidation of Frank, which caused it to be so made, if at all, and it would not have been so made, or made at all, but for the same."

The contrast in the Ryan case from the case at bar is

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apparent. In that case there was no allegation as to an enfeebled condition of the testatrix's mind, while in the case at bar it is alleged that James W. McGovern was in his dotage, suffering from uremia and other diseases, and his mind and memory were so impaired as to render him wholly incapable of making any just and proper distribution of his estate; that Joseph W. McGovern, the executor, is the husband of Mergaret Marie McGovern, the principal beneficiary; that the will was drawn and its execution attended to by the father of the other legatee; that Margaret Marie McGovern managed the property of the decedent and that a fiduciary relation existed between them.

The difference between the Heavner case and the case at bar is also obvious. In the opinion in that came it is said that no act or word of Frank Heavner was alleged tending to show that he took any part in procuring the execution of the will, or that his dominant personality had anything to do with it. The opposite is true here. In Sulzberger v. Sulzberger, 372 Ill. 240, 245, the court said in the opinion: "The rule stated in England v. Fawbush, 204 Ill. 384, 392, and since quoted and followed in numerous cases, is; "Where a will is written, or procured to be written, by a person largely benefited by it, such circumstances excites stricter scrutiny and requires stricter proof of volition and capacity. proof, required in such cases, must be such as to fully satisy the court or jury that the testator was not imposed upon, but knew what he was doing, and what disposition he was making of his property when he made his will. The active agency of the beneficiary of a will in procuring it to be drawn, especially in the absence of those who have at least equal claims upon the justice of the testator, and where the testator is enfeebled by old age and disease, is a circumstance which indicates the probable exercise of undue influence. Where the mind is wearied and debilitated by long-continued and serious and painful sickness, it is susceptible to

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undue influence and is liable to be imposed upon by fraud and misrepresentation, 'the feebler the mind of the testator, no matter from what cause, - whether from sickness or otherwise, - the less evidence will be required to invalidate the will of such person.' "

In McKaig v. Appleton, 289 Ill. 301, it was alleged that because of the physical and mental condition of the testator, one of the legatees, charged with undue influence, had been his nurse for more than two years before the will was executed; that she was of a dominating character and the testator was a person of weak and feeble will, yielding to importunity; that the nurse had intimate knowledge of the testator's business, property and affairs and acted as his agent in collecting moneys due him; that she and others acting in concert with her procured the execution of the will by importunity, and that she threatened to desert and leave the testator if he refused to execute the will. These allegations were held sufficient to charge undue influence. The court said in the opinion: "That, in substance and effect, is a charge that the execution of the will was procured by the undue influence of one of the principal beneficiaries," and indicated that the pleading of other and evidentiary facts was not necessary.

Section 42, sub-section 2 of the Civil Practice Act, (Ill. Rev. Stat. 1945, chap. 110, par. 166), provides that no pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet. The presumption against the pleader does not require that the words of the pleading should be wrested to disregard the obvious meaning of the language used. (Toledo, Peoria & Western Railroad Co. v. Brown, 375 Ill. 438, 450: Peabody v. Forest Preserve District, 320 Ill. 454). Section 4 of the Civil Practice Act provides that it shall be liberally construed,

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 to the end that controversies may be speedily and finally determined according to the substantive rights of the parties.

The motions to strike were directed to the entire complaint and while the allegations of the eighth paragraph thereof are almost entirely conclusions of the pleader, we believe the remaining allegations are sufficient to require the defendants to answer the charges therein made. The judgment order of the circuit court is therefore reversed and this cause is remanded with directions to overrule the motions to dismiss.

Reversed and remanded with directions.

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Gen. No. 10053

Agenda No. 1

IN THE
APPELLATE COURT
of the
STATE OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1945.

21/2

Board of Education in and For The School District Of The City of Rockford, Illinois, Otherwise Known As School District No. 205 Of Winnebago County, Illinois.

Plaintiff-Appellee

v.

Board Of Education Of Non-High School District No. 206 Of Winnebago County, Illinois

Defendant-Appellant

320 I.A. 317

Appeal from the Circuit Court of Winnebago County.

Dove, J. delivered the opinion of the court.

Plaintiff brought suit to recover a balance of \$4329.07 claimed to be due it for tuition of pupils who attended its school from defendant non-high school district for the school year ending June 30, 1941. The trial court sustained a motion to strike the complaint as amended and the plaintiff having elected to stand upon its complaint as amended, an appropriate judgment was entered dismissing the suit. From that judgment an appeal was prosecuted to this court resulting in the judgment of the trial court being reversed and the cause remanded with directions to overrule defendant's motion to strike and to proceed in accordance with the views announced in the opinion

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Plaintiff providt sait to recover a the mass of the first claimed to le due in Fun chinina ar arrito who ntermost ter-Lorent air avi telm il locker republication des con locker year ending fune 30, 1911. We untuk sours committee a torion to effect the complete of weended and all thinks the virg elected to stand with its complaint is sureded, as spirowniate judament was onvered dismissing the suit. From that in brackt an appeal was proscouted to this court resucting in the judgment Kilv bedramen outes all box bearever rated fruor Lairi ent to directions to everyale defendent's mutien to take and to proceed in accordance with the views announced in the opinion of this court. (Board of Education v. Board of Education, 321 Ill. App. 131.)

Upon the cause being redocketed in the Circuit Court of Winnebago County pursuant to the mandate of this court, that court overruled the motion of defendant to strike and an answer was filed. Thereafter a further amendment to the complaint as amended was filed which set forth par. 104 of chap. 122 as amended by an act approved July 23, 1943 Ill. Rev. St. 1943. A reply was filed and a trial had resulting in a judgment in favor of the plaintiff and against the defendant for \$4,329.07 and the defendant appeals.

In our former opinion we stated that the sum sued for represented depreciation charged on school buildings and equipment allocable to that part of the cost thereof paid by the Federal Government under a P.W.A. grant and we held that such was a cost item and properly included in computing tuition. Our decision upon this appeal must necessarily be the same as it was on the former appeal. The rule of law is, that when litigation is prosecuted to an appellate tribunal amd questions of law are decided, all such questions relating to the same subject matter which were open to consideration and could have been presented are res adjudicata, whether they were presented or not. This is true whether the judgment was reversed and the cause remanded or the judgment affirmed. City of Chicago v. Collin, 316 Ill. 104.

The circuit court could not err in adopting the opinion of this court on the former appeal as a guide to a correct conclusion in the further proceedings in the case and no attention will be given to arguments that the court erred in so doing.

Manternach v. Studt, 240 Ill. 464.

Coursel for appellant, however, states in his brief that the instant judgment was rendered by the trial court pursuant to the opinion of this court on the previous appeal. The law

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announced by this court upon the former appeal is the law of this case and binding upon this court as well as the trial court until reversed by the Supreme Court. There is no error in this record and the judgment is affirmed.

Judgment affirmed.

amounced by this court upon the former appeal is the law of this case and binding upon this court as well as the trial court until reversed by the Supreme Court. There is no error in this record and the judgment is efficied.

\_ Judgment\_affArmed.

43552

HIGHWAY MUTUAL CASUALTY COMPANY, a Corporation,

Appellee,

V.

LIBERTY DISPLAY FIREWORKS COMPANY and LIABERTY CHEMICAL LABORATORIES, INC., & Corporation,

Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

32 Jane 010

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On trial by the court there was a finding for plaintiff on his complaint and against defendant on his cross-complaint, with judgment for plaintiff in the sum of \$1236.46. Defendants appeal.

Plaintiff is an Illinois corporation, licensed to write insurance contracts. Defendants are engaged in business extra hazardous. December 31, 1938, plaintiff delivered to defendants an insurance policy by which it promised to indemnify them from loss under the Illinois Workmen's Compensation Act. A copy of the policy is attached to the complaint. It provides for a premium of \$8.75 for each \$100.00 of defendants' payroll. A rider endorsed on the policy is as follows:

"It is hereby understood and agreed that adjustment of premium under the Policy to which this endorsement is attached will be made at the termination of the Policy on the basis of a 50% loss ration to the Company, (loss ratio to be figured on paid and outstanding claims) but in no event is the premium so developed to be higher or lower than the payroll audit developed at the following rates:

"Low Rate: \$8.75

"High Rate: \$20,00

"This endorsement applies to Code No, 4761 under the Classifications of Operations of this Policy."

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"Low Rate: \$8.75

#High Rate: \20.00

"This enforcement applies to fode No. 4761 under the Classificationsof Operations of this Policy."

Plaintiff on October 4, 1939, gave defendants notice of the cancellation of the contract of insurance, effective October 14, 1939. After the cancellation plaintiff made an audit of defendants' books and an audit computation disclosing \$1236.46 due to plaintiff. The "Audit Adjustment" is attached to the complaint as Exhibit D. The audit bears the inscription: "Agent: Imperial Insurance Agency. Broker: Engelhardt-Krogman & Company".

The alleged defense interposed by defendants is based on the theory that the high rate of \$20.00 was not retroactive; that in the event the loss ratio became sufficiently high to call the high rate into use instead of the low rate, the computation of the amount due would not be made from the beginning of the contract but from the date of the last accident, which caused the higher rate to be brought into use. Defendants contended the written contract is ambiguous. They further say that plaintiff is bound by a construction of the contract contained in a letter dated January 19, 1939, addressed to Engelhardt-Krogman & Company, 175 West Jackson Blvd., Chicago, Illinois, Attention: O. W. Engelhardt. The letter says:

"Dear Sir:

Re: Liberty Fireworks
Highway Mutual Policy #A-3082

As per your request, we wish to confirm with this letter the fact that the rates on the above captioned compensation policy are not retroactive in the event that the loss ration becomes sufficiently high to call the higher rate of \$20,00 into use instead of the ordinary rate of \$8.75, except that they are retroactive to the date of the last accident which would cause the higher rate to be called into use. In other words, if this company were to go along for four or five months with a loss ration under 50% and suddenly have an accident which would bring it over 50%, the higher rate of \$20.00 would then be applied from the date of the accident which so increases the loss ration that the higher rate had to be charged.

We trust that this is the information desired. Thanking you for your past courtesies, we are

Plaintiff on letober 4, 1830, gave defendants notice of the cancellation of the cancellation of the cancellation elaintiff sade an ledit of defendants books and an sudit computation disclosing audit of defendants books and an sudit computation disclosing \$1236.46 due to plaintiff. The "Audit adjustment" is attached to the complaint as Exhibit D. The audit boars the inseription:
"Agent: Imperial Insurance Agency. Eroker: agelearit-roguen & Company".

The alleged defense interposed by defendants is named on the theory that the high rate of 800.00 season not retroised to that in the event the loan ratio became sufficiently night to call the high rate into use instead of the los rate, the computation of the encunt due roud for the last first a beginning of the contract but from the date of the last estimates oauced the higher rate to be brought into one, lefendant on the contended the written contract in abley a. Inc. further any that plaintiff is boundardy a construction of the contract contained in a letter dated January 10, 1070, addresse to In aletter dated January 10, 1070, addresse to In aletter dated January 10, 1070, addresse to In aletter facence facence five., Obicago, Illinois, Frogran & Coupeny, 175 set Jacanon Five., Obicago, Illinois, Attention: 0. W. Engelaardt. The letter says:

"Dear Sir:

Re: Liberty firesorme Bigh my Mutumi Polley #A-5082

As ner your request, we wish to confirm with this letter the fact that the rates on the above expetioned compensation policy are not retroactive in the event that the loss ration becomes sufficiently high to call the higher rate of \$20,00 into use instead of the ordinary rate of \$8.75, event that they are retroactive to the date of that last accient which would cause the higher rate to be called into use. In other words, if this company were to go along for four or five months with a loss ration under 50% and suddenly have an accident which would then be applied from the date of \$20.00 sould then be applied from the date of the accident which had to be charged.

We trust that this is the information desired. Thanking you for your past courtesies, we are

Very truly yours,

Imperial Insurance Agency, Inc.

By: H. W. Dorf."

The Imperial Insurance Agency was, as a matter of fact, Ralph Brusslan. He testified and described himself as a broker and soliciting agent. He had been doing business with plaintiff for some years. Mr. Korman, vice-president of plaintiff, testified, "They secured orders for policies that we saw fit to write orvreject. They did nothing else for us. They collected moneys for premiums but did nothing else for us until such time that he would submit a prospective insured when we would either write the policy or reject at. " " He was known more or less as a roving broker."

The evidence discloses Brusslan was paid a commission of 17 1/2% on this policy. He directed the plaintiff to send a part of his commission to Engelhardt-Krogman & Commany. It appears the commission was split between them. Brusslan testified, "I was a soliciting agent for the Highway Mutual and several fire insurance companies, \* \* \* I always dealt with Mr. Stone. " Stone was the president of the plaintiff company, and Brusslan negotiated the insurance contract with him. At the time this letter was written Brusslan had an office, and a man named Dorf was in it. Brusslan says of him, "He was never employed by me, but he was in my offices when I moved from 166 W. Jackson Blvd. He was in the office at 330 S. Wells Street but that was not my office. My name was on the door but I did not run the office. He did work for me but I did not pay him for such work, He is an insurance broker on his own and he has his own business. He also assisted me in some of my business. My office is supposed to keep records of correspondence which goes out by the retention of copies. I have no records of the Imperial Insurance Agency. They have been thrown away."

Very truly yours, Importal Insurance Agency, Inc. By: H. C. Corr. "

The Importal Insurance woncy was, as a matter of fort, halph Swisslan. He testified and described hisself as a broker and golisting agent. He had been doing business with plaintiff for some years. We wonten, vice-president of plaintiff, testifies, "They would endern for collisies that so and fit to write or reject. They did nothing olde for we. They collected concys for premiums but did nothing olde for we. They collected that he would sublit a proceeding insured was about so would either write the policy or reject bt. The discuss was about note or less as nowing broker.

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The evidence discress understan as half to commission of 17 1/2% on this policy. We almosted the plaining to send il . na col i nampora-ibradion do do indignica cin to iran epocare the countries not necessarily between there. Fruncish tertifred, "I see a solitoities agent for the driver a matual and raidta fina ingarence composite. " \* " . alveye dealt with ir. Stone, " Stone was the president of the plaintliff commany, and Brusslan negotiated the insurance contract with him. It the time this letter wes widtlen brooklyn had on office, and a man nexed Dorf :as in it. Grueglan says of him, "de was never emoloyed by re, but he was in my offices when i roved from lob W. Jackson Blyd. He wes in the office at 340 C. ella Etrost Dut that was not my cafflee. My name was on the door but I did not run the office. He did work for me but I did not pay him for euch work. He is an insurance broker on bis own and he has his own buckness. He also assisted me in some of my Ducinces. My office is supposed to keep records of correspondence which goes out by the retention of copies. I have no records of the Imperial Incurance Agency. They have been thrown away."

Plaintiff has filed an additional abstract. It discloses Paragraph 12 of the insurance contract, which provides:

"No condition or provision of this Policy shall be waived or altered except by endorsement attached hereto signed by the President or a Vice-President, Secretary, or Assistant Secretary of the Company; hor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. Changes in the written portion of the Declarations forming part hereof (except Items 2, 3 and 4) may be made by the agent countersigning this Policy, such changes to bind the Company when initialed by such agent. The personal pronoun herein used to refer to this Employer or to an injured employee or dependents, shall apply regardless of number bor gender."

The reply brief of defendants admits that "the burden of establishing either the actual ar apparent authority of Imperial Insurance Agency (Brusslan) rests with the defendants in this case since such authority is asserted by us".

We hold there is no competent evidence tending to show this letter of January 19 was authorized, and that the court erred in admitting it in evidence. Apparently the trial judge so thought after reflection, for he disregarded it in his findings and judgment. We hold the court properly disregarded this letter as the findings and judgment show he did.

There is another reason why judgment must be affirmed.

We hold the contract is not in any material respect ambiguous.

The rider expressly says that the "adjustment of premium"

will be made "at the termination of the Policy" on a basis

of 50% loss ratio to the company, "to be figured on paid and

outstanding claims", but in no event is the premium so developed

to be higher or lower that the payroll audit developed at

the following rates: Low rate, \$8.75; High rate, \$20.00. It

is difficult to see how any rate could have been made more

certain. The rate is as certain asvarithmetic can make it.

Plaintiff bas files on addit onal Couract. It a close Paragraph 12 of the insurance contrast, which provide:

Two condition or twidion of this tabley the salved or alte et anomating enforcement aftence in a salved or alte et anomating enforcement aftence in hereto sinned by the Irections or a Vice-Twentions or an electrons bor shell notice to tag areas, nor ebelt to the Coroley; posses ed by any ereas or by any of the Coroley, no hard to effect a salve or or usy of this continues. This continue is an in a written of this continue formity or written are the least of a salve or a salve of the Deelsrations formity or the expant convergence of its policy, even them are on the electricity or the salve or continued and or selections of this instance or the electricity are or the electricity and each of the electricity are or the electricity of the electricity are or the electricity and or the electricity and or the electricity and electricity and electricity.

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There is another reason why judgment must be sufirmed. The hold the contract is not in any material respect untiguous. The rider expressly says that the "adjust out of premium" will be made "at the termination of the Dollay" on a bests of 50% loss rate to the serminarion of the Dollay on a best and outstanding claims, but in no event is the premium as developed to be higher or lower that the payroll audit sevel ped at the following rates: Low rate, is "To" "igh wate, #20.00. It is difficult to see how any rate could have been made more sertain. The rate is an certain aswarkthmetic can make it.

5.

Plaintiff was not bound by the letter written without authority by one broker to another, and the judgment will be affirmed.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

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Plaintiff was not bound by the letter united sitable suthority by one broker to another, and the judgment will be affirmed.

. MIRPINEL

O'Connor and Wesseyer, Jd., concur-

43617-43631

HERMAN M. SIEWERSTEIN,
Appellant,

v .

BERKSHIRE LIFE INSURANCE COMPANY, a corporation, Appellee.

BERKSHIRE LIFE INSURANCE COMPANY, a corporation, Appellee,

7.

JACKSON REALTY AND MANAGEMENT CORP., a corporation, and HERMAN M. SILVERSTEIN, Appellants.

No. 43631 is an appeal from Circuit Court of Cook County.

S & 1.11 & 1.8 Nos. 43617 to 43630

Interlocutory appeals
from Superior Court of
Cook County.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Fourteen of these appeals are from the Superior, one from the Circuit Court. In each Superior Court case a receiver was appointed on motion of the plaintiff insurance company in a suit brought by it to foreclose a mortgage on real estate described in the complaint. The Circuit Court appeal is from orders dismissing the complaint filed by Silverstein against the insurance company to obtain temporary and permanent injunctions restraining the suits to foreclose these fourteen mortgages.

A temporary injunction issued, was set aside by stipulation, the matter heard on renewal of plaintiff's motion for an injunction and defendant's motion to dismiss the suit for want of equity on the face of the complaint and for lack of jurisdiction.

The indebtedness in the fourteen foreclosure suits is over \$1,073,000. The notes by their terms fell due December 31, 1941, but by written agreement were extended to December 31, 1944.

The suits in both courts were filed on the same day,

43617-43631

HERHAM A. SIEVE STRIK, NO PILEEL,

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DOMENNY, a corporation, Declies.

COLEMEN LIFE INCHANCE of COLECCE COLECCE

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A temporary injunction issues, the set called by stipulation, the matter heard on recent, of plainting action for an injunction and defendant's setion to dissise the suit for west of equity on the face of the complaint and for less of juristiction.

The indebtedness in the fourteen foreclosure suits is over \$1,073,000. The notes by their terms fell due December 31, 1941, but by written agreement were extended to secomber 31, 1944.

The suits in both courts were filled on the same day,

June 25, 1945; the complaints in the Superior Court at 3:15 P. M., the suit in the Circuit Court at 4:30 P. M. In other words, the foreclosure suits were filed one hour and fifteen minutes earlier than the injunction suit. The Circuit Court suit was dismissed on motion of the insurance company September 18, 1945. Applications of the insurance company for receivers were allowed in each Superior Court case the following day, September 19. The insurance company was sole plaintiff in each and all the foreclosure suits. Silverstein and Jackson Realty and Management Corporation were defendants. In the Circuit Court Silverstein was plaintiff and the insurance company, alone, defendant.

The briefs argue much about which court first obtained jurisdiction. Ill. Rev. Stat., chap. 110, sec. 5, seems to be clear to the effect that the filing of a complaint is the beginning of a suit and therefore gives the court jurisdiction. Silverstein does not deny the filing would give the court jurisdiction of the subject matter but on the authority of Union Mutual Life Ins. Co. v. University of Chicago, 6 Fed. 443, argues it was necessary to acquire exclusive jurisdiction that the court should also obtain jurisdiction of the person of the defendants. This is not the general rule. Certainly it is not the rule in Illinois. See Section 5 of the Illinois Civil Practice Act and Schroeder v. Merchants & Mechanics Ins. Co., 104 Ill. 71, 75; Vincent v. McElvain, 304 Ill. 160, 163. People v. Brewer et al., 328 Ill. 472, is cited to the contrary but is not applicable because the proceeding there was special and statutory under the Local Improvement Act, as amended in 1915.

Plaintiff is a foreign corporation under the laws of Massachusetts licensed in Illinois. Cost bonds were not filed

June 25, 1945; the complaints in the apender orated 18315 F. T., the suit in the direction of the configuration of the forestocare suits are filly and house of the forestocare suits and file and the injuretion suit. The directive company suit was dismissed on motion of the insurance company expended 13, 1945. Application of the insurance company for receivers were allowed in the insurance case the following day, applicable 19. The insurance company was said plaintiff in each and all the "cryclosare of the ilvertisin and Jackson Seath the Court When and the Court invertein was plaintiff in the Circuit Court invertein was plainted in the Sheulant.

The briefly angua and a would remain the about obtained jurisdiction. Ill. Pov. tat., sinp. 116, sec. j, beens to be clear to the calfiet that the filling of a semplaint is the beginning of a sunt and Where ore lives the court jurisdiailverstein coss not dany the Miling would give the court jurisdiction of the subject mutter but on the authority of Union Matagl bire Ins. Co. v. Maiversity of Unio 10, 6 Fed. 443, argues it was nocessary to acquire malusive jurisdiction most of set to noticely hard nittho osle black truce out tant of the defendants. This is not the general raic. Certainly it is not the rule in Alimois. See Section 5 of the Alimois Civil Practice . ot and Compoder v. More contact & Mechanics Ins. Co., 104 Ill. 71, 75; Vincont v. Nethvain, 304 Fll. 100, 163, People v. Brewer et el., 228 Ill. 472, is cited to the contrary but is not applicable because the proceeding there was special. and statutory under the Local Emprovement Act, as amended in 1915.

Plaintiff is a foreign corporation under the laws of Massachusetts licensed in Illinois. Cost bonds were not filed

on beginning the suits in the Superior Court until after the defendants raised that question, when such bonds were filed. It is now argued the Superior Court was without jurisdiction until after the filing of the bonds. This court and the Supreme Court have held to the contrary. Plaff v. Pacific Express Company, 251 Ill. 243; Gremer v. Illinois Commercial Men's Ass'n, 176 Ill. App. 1, 12.

There was a close race here, but plaintiff won. The Superior Court having first obtained jurisdiction will retain it to the end of the litigation. <u>Molan v. Barnes</u>, 268 Ill. 515, 520; <u>St. Louis Bridge Co. v. Fisele</u>, 263 Ill. 50. We hold the Superior Court first obtained jurisdiction, and that the complaint in the Circuit Court was rightly dismissed.

As to the merits of this controversy, the issues between these parties were the same in the suits in both courts.

The titles to twenty-one tracts of land in Chicago were held in the names of nominees of the insurance company, who lived at Pittsfield. Massachusetts. Contracts to sell and buy were made between the holders of the titles and the Jackson Realty and Management Corporation. The corporation was, in fact, owned and controlled by Silverstein. Contracts for the purchase notes and trust deeds, all in writing and showing every material part of the transaction, were executed and delivered August 31, 1940. These documents disclose a complete integrated transaction, and copies thereof are attached to the complaint filed in the Circuit Court. The basis of the suit for injunction, as well as the defense in each of the fourteen suits to foreclose, is that prior to and on the day these written documents were executed, the insurance company entered into an oral agreement with defendant Silverstein that if he would buy seven parcels of land in addition to the other fourteen, the insurance company would at maturity extend the time

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Defendants make the point that because no replications were filed by plaintiff in the Superior Court suits to this defense, the affirmative defense must stand admitted on the record. We hold to the contrary under the circumstances here appearing. On the hearing in the Superior Court, plaintiff offered to file replications. The court indicated he did not think it necessary. Defendant did not object. This amounted to a waiver. St. Louis A. & T. H. R. R. v. Brown. 34 Ill. App. 552, 555; Allen v. Michel, 38 Ill. App. 313, 318; 3 Corpus Juris 330; Walter Cabinet Co. v. Russell, 250 Ill. 416, 421; Eagle Indemnity Co. v. Hooker, 309 Ill. App. 406; Ford Motor Co. v. Nat. B. & I. Co., 294 Ill. App. 585.

The rule that prior or contemporaneous oral agreements may not be interposed to vary the terms of a written contract is held by some authors to be not a rule of evidence but of substantive law. Wigmore, Evidence, 3rd Ed., Vol. 9, sec. 2400; 1 Restatement of the Law of Contracts, chap. 9, sec. 237. A leading case on this subject is Mitchell v. Lath. 247 N. Y. 377, 160 N. E. 646. The law announced by our Supreme Court is likewise. Telluride Power Co. v. Crane Co., 208 III. 218, 226. The

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for payment of the notes riven for the fourteen parests until 1956, the date on which the more, see and notes given for the seven additional tracts would mature. The insurance conjumy by motion to dismiss raised the question in the the the the the court, and also in the aperior fourt, unged this definese to the cuits famther could not an interposal tracts fully for the reason that it was an electric to very by ordi, from contemporaneous evidence the tente of a thirtheory contemporaneous evidence the tente of a thirtheory of the first ordi, sign agreement, enterpoint to the the the same of a thirtheory of the first ordinal of the notion.

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The rule T. & prior or contemporariseds or I agreements may not be increpend to vary the terms of a critical centract is held by some mathers so be not a rule of orience but of substantive law. ignore, widence, and Ma., Vol. 9, sec. 3-03; I Mestatement of the Law of Contracts, shap. 9, sec. 21%. I leading case on this subject is atteined by our Supreme Court is like-160 N. E. 646. The law announced by our Supreme Court is like-wise. Telluride Power Co. v. Srame Co., 208 III. 418, 226. The

Appellate Court has followed in Chicago Title & Trust Co. v. Cohen. 284 Ill. App. 181.

On this question other important circumstances appear in these cases. Silverstein, the purchaser, is a lawyer of experience. A perusal of the writings shows he was careful to have the writings include other provisions favorable to him. We naturally ask, why was this one left out? Even a layman is presumed to know the law. Not to unduly extend the opinion, we cite without comment other cases. Schulz v. Plankington Bank, 141 Ill. 116, 122; Schroer v. Wessell. 89 Ill. 113.

We also hold the alleged parol agreement was without consideration. Silverstein did not promise in the oral contract to do anything he was not already bound to do by the written contracts. Crossman v. Wohlleben. 90 Ill. 541; Strange v. Carrington Co., 116 Ill. App. 410, 413. Keith v. Radway. 221 Mass. 515, 109 N. E. 446, with other cases are cited in the reply brief for the first time but are distinguishable on this and other grounds. A proposed written agreement submitted by Silverstein to extend the time of payment of these fourteen notes provided also for the reduction of the principal indebtedness to \$893,000 the second year and to \$793,000 the third year of the extension. We shall not stop to discuss the question raised by the plaintiff that the alleged oral contract, covering a term of fifteen years, is void under the Statute of Frauds. 27 Corpus Juris 185; Hide & Leather Bank v. Alexander, 184 Ill. 416; Brown on Statute of Frauds, Sec. 284; Deutsch v. Textile Waist Co. 209 N. Y. S. 388; Green v. Pennsylvania Steel Co., 75 Md. 109, 23 Atl. 139. The argument that defendant is not bound by this parol rule because of part performance of the contract is not valid hor applicable to the facts, since the evidence shows

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All this is worthy of notice when we consider the propriety of the orders appointing receivers. We hold. after considering the evidence, the Superior Court did not err in the exercise of its discretion in this respect. There was no personal liability on the notes. The sole security was clearly scant and meager, The evidence to that effect was not contradicted. The debt was past due. The premises were in need of repairs. The mortgagee in the trust deeds had agreed to the appointment of receivers in case foreclosure bills were filed. We are quite aware that the last named fact does not justify the exercise of arbitrary power. We have read again and have been long familiar with Bagdonas v. Liberty Land & Investment Co., 309 Ill. 103; Frank v. Siegel. 263 Ill. App. 316; Klass v. Yavitch, 302 Ill. App. 229, and Seyfarth v. Leonard, 316 Ill. App. 139. We do not think the opinions in these cases inconsistent with the views herein expressed. We hold the trial court did not abuse its discretion in these Superior Court cases. Bagley v. Illinois Trust & Savings Dank, 199 Ill. 76.

In appeal No. 43617 appellants made a motion to strike pages 65 to 662 inclusive from the record and to strike comparable pages from the record in Nos. 43618 to 43630. The motion was reserved to the hearing. It is allowed.

In appeal No. 43631 the orders dismissing the suit of plaintiff in the Circuit Court are affirmed. In Nos. 43617 to 43630 the orders of the Superior Court are also affirmed.

ORDERS AFFIRMED.

Niemeyer, J., concurs. O'Connor, J. I concur in the result but not in all that is said in the foregoing opinion.

that whatever the purchaser may have dens by were of improved ment, was exclusively reflerable to the unit, who contracts and had no relation distover to any allocaed panel agreement.

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Of the orders of the laperior Court are lass different.

Microyor, 1., concurs. O'vonner, J. I concur in the result but not in all that is said in the foregoing opinion.

ISABEL F. WOOLF,

Appellee,

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IRVING W. WOOLF,
Appellant.

APPEAL FROM SUPERIOR COURT COOK COUNTY.

321 I.A. 319

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree granting plaintiff separate maintenance, awarding her \$150 per month for the support of herself and daughter and \$2,500 attorney's fees, and finding defendant in areears on account of temporary maintenance and support theretofore ordered paid in the sum of \$2,533.34, and directing that execution issue therefor.

The original complaint charged defendant with adultery. On the trial the court stated that plaintiff had failed to prove the charge of adultery, and the complaint was amended to charge that the parties "separated on September 22, 1942, when defendant instated in numerous conversations with plaintiff prior thereto that she 'get the hell out,' and by refusing to renew the lease on their apartment, in fact forced her to leave, and since said date plaintiff has lived separate and apart from defendant, without fault on her part." The decree found "That defendant refused to renew the lease on the apartment occupied by the parties, and in fact did not renew the lease, forcing the plaintiff to live elsewhere, without any fault on her part." In addition to her testimony relating to defendant's refusal to renew the lease to the apartment she and defendant and her daughter were occupying, or to provide suitable living quarters elsewhere, plaintiff testified to admissions by defendant of his infatuation for another woman and his desire for a separation. She also introduced the testimony

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ISABEL F. WOOLF,

Annellee.

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RVING S. WOCLF,

APPETL FROT SUPERLOR COUPL COOK CONTY.

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MA. JUNE STREET, STATE OF STATE OF STATE OF STATE

Defendent appeals from a decree granting plaintiff opparate main/senance, awarting her \$150 her month for the support of hermalf and internal and finding defendant in argument on account of temporary maintonance and au post tileretofore ordered paid in the sum of \$2,507.34, and 61 moting that arecution issue toererow.

"ye original complaint charged defendent with additory, On the trial the court stated that plaintiff had failed to prove the obtras of soultery, and the complaint was emented to charge that the parties "separated on sectorial at 142, then defendant incieted in numerous cours sations with plaintiff prior thereto that she hat the nell out, and by refusing to remew too lease or their anarhment, in fast forced har to leave, and since said date clainfilf see lived saparate and apart from defendant, without fault on her part. " The decree found "That derendent refused to renew the lease on the apartment occupied by the parties, and in fact did not renew the leage. foreing the claintiff to live elsewhore, without any fault on her mart." In addition to har testimony relating to had one Insuffice off the least of the least of inches at inches the defendant and har daughter were occupying, or to provide suitable living quarture elsewhers, plaintiff testified to admissions by defendant of his infatuation for enother woman and his desire for a separation. She also introduced the testimony

of other persons to alleged admissions by the defendant supporting her claims. By stipulation the report of a private detective employed by plaintiff, showing meetings of defendant and the other woman involved and their affectionate conduct, together, though not adultery, was received in evidence. Defendant contradicted the testimony of the plaintiff, admitted knowing the other woman and of being with her on various occasions. His testimony falls far short of admissions establishing adultery. It does show conduct not to be expected from a loving husband and father of two children. The testimony tending to show defendant's infatuation with the other woman was competent as a circumstance to be considered by the court in weighing the testimony of plaintiff and defendant as to the reasons for and the facts leading to their separation. The trial judge, who heard the testimony and saw the witnesses, was in a far better position than this court is to judge of the credibility of the testimony presented, and we are not permitted on the record to disturb his finding.

Defendant is engaged in the advertising business. Plaintiff claims and defendant denies that prior to their separation he told her he was making around \$16,000 a year. The competent evidence in the record shows that not later than their separation his income had dropped to between five and six thousand dollars a year on account of war conditions. The testimony shows that plaintiff's attorney put in in the preparation of the complaint, order for injunction, drafting of notices, conferences with counsel, and deposition, 40-1/2 hours; and in court appearance and before a special commissioner, 54-1/2 hours; and that he had received from the defendant onbaccount of services \$200. There is testimony by a lawyer, whose qualifications admitted, that an attorney of the experience of plaintiff's counsel should get \$30 to \$40 an hour for court work and \$25 to \$30 an hour for office work, without condideration of the identity of the

of other preons to alleged admis one by the de endant supporting the claims. By attouration the recent of a private detective employed by plaintiff, aboring westings of defendant and the other woman involved and their a festionate conduct. executive of bouleset ask typellers to evidence. Defendant contradicted the bentiness of the allitting and ted knowing the other woran and of being with ser on various occasions. His bestimony fully for above of this long established ing adultery. It does show conduct now to be expected from s loving husband and father of two children. .. testinory tending to show lefendant a inflatantian diff. I during norm was connected as a circumstance to oe come or of ar to a number of meters tod recommend of plaintiff and defends to a collect ed and the facts leading to their serves. .. the tell judge, who heard to testimony are one the withe ces, on in a fer better position than this court is to jutty or the seems thing of the testimony or sented, and se upe not per itted on the record to disturb his finding.

Defendant is engy ed in the advertisher misiner. Their felight claims and defends to denies that prior to their selenation he told her he was making area & 415,000 a pear. The ocreatest evidence in the record shows that not later than their separation his income had dropped to between five and six that and delight a year on account of war conditions. The testimony shour that plaintiff's att racy but in the preparation of the complaint, order for injunction, destring of notices, conservances with coursel, and deposition, 40-1/2 hours; and in court appearance and before a special contissioner, 54-1/2 hours; and that he had received from the defendant on account of services 1200.

There is testimony by a lawyer, whose qualificationsis admirted, that an attorney of the experience of plaintiff's counsel should for office work, without court work and 125 to \$30 to \$40 an hour for court work and 125 to \$30 an hour

parties, their ability to pay, the results accomplished, or the nature of the litigation. The court awarded plaintiff \$2,500 on account of services rendered by her attorney. Defendant contends that this is grossly excessive. In the present case neither the questions of fact nor the questions of law were involved or intricate. In Metheny v. Bohn, 164 Ill. 495, 499, the court said: "In fixing the amount of a reasonable fee, the examination should be directed to what is customary for such legal services where contracts have been made with persons competent to contract, and not what is reasonable, just and proper for the solicitor in the particular case. The inquiry should be, not what an attorney thinks is reasonable, but what is the usual charge. " In Johnson v. Johnson, 125 Ill. 510, 521, as separate maintenance proceeding, it was held that allowance of solicitor's fees should be made not only in view of the services rendered or to be rendered, but also the ability of the party against whom the order is made to pay The allowance here made is approximately one-half the yearly income of the defendant, who has already paid \$200 on account of attorney's fees for plaintiff. The amount allowed appears to be greatly excessive. This court on appeal is permitted to consider its own experience in determining what is a reasonable attorney's fee to be allowed. Hutchinson v. Hutchinson, 105 Ill. App. 349, 351; Church v. Church, 324 Ill. App. 557, 563.

Complaint is also made that the court should have reduced the temporary allowance for maintenance and support \$50 a month because of the absence of the son of plaintiff and defendant in the armed forces. There is no evidence in the record showing when the son went into military service, and the question of the reduction, if any, of this allowance was a matter in the discretion of the trial court, and we cannot say that it has been abused.

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parties, their ability to pay, the results accommissed, or this nature of the litigation. The nourt awardee plaintiff \$2.500 on account of services rendered by her atturney. Defendant contends that this is grossly everysive. In the present case metther the questions of fact nor tag questions of law were involved or intrieste. in .atheny v. hom. 164 Ill. 495, 499, the court said: "In firing the arount of a resso able fee, the examination chauld be directed to what is customary for such longil pervices where confracts luse been wade with prosons now test to contract, and nor contract able, just and amopen for the solf item in the call indian The inquiry should be, not what an art was this to in the case of but what is the nevel charge. ' In deposed w. . order, ise ILL. 510, 551, as separate emintended oroused t, it was neit that allowance of soliritor's face chould to made hot of im in view of the dervices resdered on to redrand, but the the ability of the carty applied with the order to read to the same. The allowance hors our sil composited a ma-make the yearly income of the effendant, who ear alresty usid the on account of automacy's from the chalifalf. Inc ecount old ad acpears we be a readly excessive. This court on a self to be pitted to consider its own expertence in defere that what is a magnable atturnay's fet to be allo ed. Hatchingth v. Hatringan, 105 INI. App. 549, 561; Shureh v. Guereh, 384 HI. And. - 7, 788.

Complaint is also made that the court should ware reduced the temporary allowance for maintenance and cuprort iff a month because of the abecase of the con of plaintiff and defendant in the armed forces. There is no evidence in the record showing when the con restinto military service, and the cuestion of the reduction, if any, of this allowence was a matter in the discretion of the trial court, and se cannot say that it has been abused.

The decree of the trial court is affirmed in all respects except as to the allowance of attorney's fees. The cause is remanded with directions to fix this allowance at \$1,000.

All costs of the appeal are taxed against the defendant.

AFFIRMED EXCEPT AS TO ALLOWANCE OF ATTORNEY'S FEES, AS TO WHICH GAUSE IS REMANDED WITH DIRECTIONS TO FIX AT \$1,000; ALL COSTS OF A PEAL TAXED AGAINST DEFENDANT.

Matchett, P. J., and O'Connor, J., concur.

The decree of the trial court is affirmed in all res ects except as to the allowence of alterney's fees. The cause is remanded with directions to fix this allowence at 11,000.

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ATTIMED EXCIPT IN TO LESS 100 COLUMN AND THE TELLS OF THE

Motebett, .. J., and O'tomaur, J., concar.

JANET ROLAND,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

APPEAL FROM
CIRCUIT GOURT
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$2,500 entered against it in an action for personal injuries sustained by plaintiff as a result of a fall due to a hole or depression in an alley extending south from 67th to 68th street between Carpenter and Morgan streets in Chicago. The sole question presented is whether the trial court should have directed a verdict for defendant.

The accident occurred on Sunday evening, May 9, 1937, about 7 or 7:30 o'clock. Plaintiff was then living on Carpenter street near 68th street. Her son lived in the same block. on Morgan street near 67th street. Plaintiff was returning to her home through the alley after a visit to her son; the day of the accident was clear and it was dusk; she could see in front of her 30 or 40 feet, maybe more; there was no obstruction of any kind to her view; the lighting condition was about the same as in the court room at the time of the trial, when she gould see all the way across the room about 25 feet and could see the pencil counsel for defendant was holding in his hand; the son had moved into his Morgan street home the preceding October; plaintiff nearly always took the alley on her visits to him and her return to her home because it was a short cut, and had passed the particular spot where she was injured, 100 times or more, The hole or depression causing plaintiff's injury

JANET POLAND,

Appeller,

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CITY OF CHICAGO, a Municipal Corporation, Appellant.

Freedon Room

MR. JUSTICE HISMANIA WILL THE PART OF THE OWN OF THE POPUL

Defendant appeals from a juderent for ... We entered against it in an action for a final lajuria sustained by plaintiff as a result of a 18% one for a lajuria sustained by in an alley entending abusts from 17% to "the others between in an alley entending abusts from 17% to "the others between Corporter and forg at attreast in 31° ago. The solution to presented is whether the wrist court about and directed to verdict for defendant.

The cocident olderwood on landay eventry, the 2, 19 7, about 7 or 7:30 o'clock. Plaishiff as test living on 3 moenter street ager of the training and live in the case aloud, on Morgan atract nows ofth atract. Flithtl " is counting to her home through the ailey after a vinit to se you; the day of the accident the clear and it was dust; the could ger in front of her 30 or 40 feet, maybe nore; thore and no obgrachion of any kind to her view; the lighting consiston was about the same as in the court room it the time of the thirly when she would see all the way across the room about 25 feet and could see the penoil counsel for defendent was holding in him hand: the con had moved into his Morgan street home the preceding October; plaintiff nearly always took the alley on her visits to bim and her return to bee here because it was a short out and had passed the particular spot where sie was injured, 100 times or more, The hole or depression sausing plaintiff's injury

was about 5 feet long, 3 feet wide, and sloped to a depth
of about 6 inches; it was in the center of the alley, which
was 20 feet wide, and there were unobstructed passageways a
approximately 7 feet wide on each side of the hole. Plaintiff
testified that she had probably noticed the hole a number of
times before the accident when she visited her son; she had
never stumbled in the hole before that time; she did not think
she ever walked over it before; she must have gone around it.
"I didn't see it when I fell in it." "I wasn't noticing it
then." "I did not notice it." "I knew it was there."

In Illinois Central R. Co. v. Oswald, 338 Ill. 270, 274, the court said: "In the absence of willful or wanton injury on the part of the defendant the plaintiff cannot recover in an action for personal injuries unless it appears he was in the exercise of ardinary care for his safety, and in such case it is the duty of the court to direct a verdict for the defendant if there is no evidence tending to show affirmatively that the plaintiff was exercising due care or to raise a reasonable inference of such care. A party has no right to knowingly expose hinself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." To the same effect are Pienta v. Chicago City Ry. Co., 284 Ill. 246, 251; Wilson v. Illinois Central R. Co., 210 Ill 603, 607. Plaintiff cites cases such as City of Mattoon v. Faller, 217 Ill. 273; Wallace v. City of Farmington, 231 Ill. 232; and Village of Clayton v. Brooks, 150 Ill. 97, holding that the mere passing over a sidewalk known to be defective is not per se contributory negligence. Plaintiff also cites City of Chicago v. Babcock, 143 Ill. 358, where it was held that a pedestrian may ordinarily assume that a sidewalk is in a reasonably safe condition for travel and is not absolutely bound

was about 5 feet long, 5 feet wide, and sloped to a opth of about 6 inches; it sas in the denter of the alley, which was 20 feet wide, and there were unotest acted pa sageways a approximately 7 feet wide on each wide of the hole. Flaintiff testified that she had prombly notions the hole a number of times before the merident and she vielted nor on; she had never stumbled in the hole before that the hole before that the hole before that the hole before the fine and the she was the ever walked over it before; she amed any gone around it.

\*\*I didn't see it shen I fell is it. I see's a tiple."

In Illincia Jeneral P. 70. V. Jewald, ATS Ill, PVI. Pri. the fourt eaid: "In the absence of willful or enter injury on the part of the defendent the laif tiff employ eventer in en el el el egrecia di pecimi peirellai fracer e roi nollos sa exercise of erdinary ours for his writty, and in agent here it is the duty of the cour to timent a vellet for the lafendont if there is a sylder of the tention of the Aftroutively that the plaintiff who e ordining our care or to voice a reagonable inference of such users a comba brasers as with the require errors of the reasons of therein seems vigations eldagor or to eas est to behinve avoidants in this worker an action procession, d To the sems offect are ligate v. Dilosep 61cv Tv. do., 284 III. 246, 251; 41000 v. Illinois Control e. 20., 210 111 803, 607, Plaintiff often onece such as Utty of Mattooh v. Feller, 217 Ill. 273; walleds v. Jity of Permington, 851 Ill. 252; and Villare of Clayton v. dwoole, 185 Ill. 97, bolding that the mere passing over a sideralk known to be defeative is not per se contributory acgli sence. Plaintliff lleo oftes City Chicago v. Sabgook, 143 Ill. 358, where it was neld that a podestrian may ordinarily assume that a side talk is in a reasonably eafe condition for travel and is not succludely bound

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to keep his eye constantly fixed on the sidewalk in search of possible holes or other defects therein. That case can have no application here because the plaintiff admittedly knew of the defect in the alley now complained of and had passed around it at least 100 times. Furthermore, she admits that she did not notice the hole before stepping into it and falling, although at the time she could see 30 or 40 feet, maybe more, in front of her. Having knowledge of the defect in the alley, she could not rely upon the assumption of its reasonably safe condition for travel. The care required of her was commensurate with the known conditions which confronted her and would require that she observe where she was walking as she approached the hole in which she fell. There being a complete absence of any evidence showing care on the part of the plaintiff, the court should have directed a verdict. Reiter v. City of Chicago, 303 Ill. App. 60 (abst.); Illinois Central R. Co. v. Oswald, 338 Ill. 270; Dee v. City of Peru, 343 Ill. 36, 42.

The judgment is reversed.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

to keep this ere constantly fixed on the siders in nearth of roughle helen of our disease to arein. Thet our can winessing file James and an own of the first to a contract to and for the handeleast on well all all tooler and to went narred around it of lower l. Times. art ermore, she adm to The di city was the enoted of a Nit soften for his only that Inlling, although at the time one but year to me at from. maybe more, in front of ther. Havier co coses of he deter in the olley, : a sorld of rely who have store a second of re somebly gate condition top fearel. It super from the opwas commanded with the common two commons as the common same to tile was not take and the same and the same and the first bars and age she auproceed the bele in which she was a few benever complete observe of the restaurance engine in the energy of the man of the ma . . . ar med plantilly (1.780%) Co . pri . III D & conepid) la vill v. Javell, a S. Ill. 89 and a greek of there . C. C. . - - wor of a marginal out

Matchett, . J., was shiouner, s., course.

CHICAGO CAR ADVERTISING COMPANY, a corporation,

Appellee,

V.

VAN GRAY, also known as VANDORF GRAY,

Appellant.

BANK OF MONTREAL, a corporation, Garnishee-Appellee and Cross-Appellant.

COOK COUNTY COUNCIL VETERANS OF FOREIGN WARS OF THE UNITED STATES. a corporation, Petitioner-Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff instituted garnishment proceedings on its judgment against the defendant. The garnishee bank answered that it had \$4,091.99 on deposit to the credit of the defendant in an account designated as Van Gray, doing business as Veterans of Foreign Wars of U. S. Rodeo. Judgment was entered against the garnishee for the use of plaintiff for \$738.30, which judgment was satisfied on the day of its entry. No question is raised on this appeal as to the satisfaction of that judgment. No disposition of the sum of \$3,353.69 remaining on deposit with the bank was made by order of the court,

Within 30 days from the entry of the judgment against the garnishee, the petitioner Cook County Council of the Veterans of Foreign Wars of the United States, a corporation (hereafter called the Council), intervened, claiming to be the owner of the funds on deposit with the bank. Defendant appearing specially, moved to dismiss the petition of the Council on the ground that the judgment in favor of plaintiff having been satisfied, the court had lost jurisdiction of the subject matter, and that petitioner "is an outside creditor, if any, and has no standing before this court in connection with the vacating

CHICAGO CAR ADVINTIBLES COERTES a corporation, Anuelles,

VAN CRIN, ales known as to Fire , YASO A wellars.

BANK OF HOMERSAL, a componstion, Surnisher-Appellee and Crosten A-veord

THE RESERVE ADDITION AT HUCO YOOD POREICH WARE OF THE STREET TO THE THE a corporation, 

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ES. J. STICK W. THE PROPERTY

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Tithin 30 faye from the entry of him , shipsing ignin t the garnishee, to metitioner look lounty buneil of the Veterans of Pareign targ of the United States, a compriston (hereafter called the Council), intervened, elaiming to be the owner of the funds on deposit with the bank. Defendant appearing specially, moved to dismiss the retition of the douncil on the ground that the judgment in favor of plaintiff leving lean eatissied, the court had lost jurisdiction of the subject matter, and that petitioner "is an outside oreditor, if any, and has no standing before this court in connection with the vacating

of the original judgment or the judgment entered against the garnishee defendant. This motion was not passed upon. After a hearing on which defendant offered no evidence, judgment was entered in favor of petitioner and against the garnishee for \$3,353.69. From this judgment defendant appeals, and the garnishee filed notice of cross-appeal from the same judgment. Defendant has withdrawn its objection to the jurisdiction of the trial court to permit petitioner to intervene, and the sole question now presented is whether petitioner is the owner of the funds now on deposit with the garnishee so as to be entitled to intervene in the garnishment proceeding.

Under date of August 4, 1944 defendant and petitioner entered into an agreement for the presentation of a rodeo in Soldier Field at Chicago, Ill., on September 9 and 10, 1944. In this agreement the defendant was referred to as producer, and petitioner as the Council. This agreement provided that the producer should hire, employ and engage all acts and performers for the show and provide all horses, ponies, steers, bulls, calves, and such other livestock as shall be required, and shall procure all necessary printing and advertiging matter - all contracts for the above to be approved by the Council; that the producer shall pay all expenses in connection with the rodeo, except the cost of distribution and sale of tickets by the Council or individual Veterans of Foreign Wars of the U.S. posts: that the producer should furnish a bond to guarantee the presentation of the rodeo, and also furnish specific public indemnity insurance, and that the producer save and keep the Council free and harmless of and from any and all claims whatsover arising out of the contract and indemnify the Council against any and all such claims; that any commissions and costs of distribution and sale of tickets made through the Council itself or any of its individual posts shall be borne by the Council and that any

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MINOR OLTO If appart , 1 and a new or of the m entered into an agreeve this or a transfer of interesting Soldier Hield at Ital. As, 191, the control of the Italian blaid argreenced that the the transfer of real to an end to the transfer of the frequency the congruent of the engineer to memory a while allowed and as hire, encloy and ear to the ter ter to the range of the and provide til movemen, somion, simple, ill epitere , and such other liver of the self the relation of the self the all necessity priories ad severification of the out out of for the above to be all our doug time is not yell the connecesshall pay all esponses in our betten district on an act, or see the or limited bar of them to the milital at the contract individual Voter, ar of Foreign 'are of the . . oct; that the producer should fireful a sond to common to the posterious of the rodes, and also furnish security ability tecurance, and that the eroturer save and keep the Caurell free and harmlede of and from any and all claims between rights out of the contract and indensify the Council against any and all such claims; that may comissions and conts of a or incurior and sale of tickets made through the douncil it elf or any of its individual posts shall be borne by the Council and that any

and all tickets delivered to the Council by the producer shall be returned by the Council if unsold, or if sold, the full face cash value thereof shall be returned by the Council prior to final accounting; that the gross proceeds after paying all costs, charges and expenses shall be distributed two-thirds to the producer and one-third tonthe Council; that "the Producer shall immediately, and within 10 days following the last performance and presentation of said production or show, prepare and submit to the Council a full and complete audit and statement of all receipts and disbursements whatsoever in connection with said show or production, and shall immediately pay over and deliver to the Council such amount or amounts as shall be found to be due to the Council by virtue of this contract as its portion of the net profits of said show or production"; that should there be no profits, or if the said production results in loss, then any and all loss or losses shall be borne entirely by the producer, who by the agreement releases all chaims against the Council by virtue of any loss incurred under operation of the contract.

Defendant opened his account with the garnishee on August 26, 1944. September 8, 1944 defendant notified the garnishee that all checks and drafts drawn on the account were to be countersigned by either D. H. Caplow or Carl R. Olsen along with defendant's signature. At that time Caplow was Judge Advocate of the Council and Olsen was Commander. On October 7, 1944 defendant by letter to the garnishee withdrew, countermanded and canceled the foregoing instruction and directed the garnishee to honor all checks thereafter drawn on the account when signed by him individually. Shortly after the presentation of the rodeo, defendant presented to the Council a report showing gross receipts of \$67,686.45, total expenses \$64,815.38, leaving a net balance of \$2,871.07. The Council claims an oversharge of \$13,531.03.

receiver or yd itom ob sad or sesuileb afodoit ile bas shall be returned by the Council if uneall, or if evid, the full face cash value thereof shall on returned by the Jounett prior to final accounting; that the gross process of r paying and dosts, charges and encesees shall be distributed two-tributes to the producer and one-third toothe Coursil; that "tags Produces abel tambéletely, and sithin le care tollo ins the last performance and presention of said appropriate or sans, En dieux edelos e bra fful a listuod edd od dirdus Ess esseno statement of all receipts and disburgeris deligerer is connecthen with and own or reduction, and easily into the testing pay over and deliver to the Council such as and deliver to counts of shall be found to se due to one is until by virtue of thic contruct as its pintion of the act orefits of said above or production"; that should share or so profite, or if the said reduction results in loss, then if see all fore or logics aball be borne entirely by the eroduser, who by the enterent releases all chains seained to Couceil by virtue of the long ito meaco end to nottenago mobile borreoni

Sefendant opened his encount with the revalence on August 26, 1944. September 3, 1944 extended notified the garnishee that all obecks and drafts down on the countereigned by cliner J. E. Caplod of that H. Cleen slong with defendant's simplers. At that the Corlos was long with defendant's simplers. At that the Corlos was for ander. On Judge Advocate of the Council and Cleen was Con ander. On october 7, 1944 defendant by letter to the carriebee withdres, down-ermanded and canceled the foregoing instruction and directed the garnishes to honor all checks theresiter drawn on the account when signed by his individually. Shortly after the presentation of the rodes, defendant presented to the Council a report showing gross receipts of 867,685.45, total expenses claims an overcharge of 515,551.07. Whe Council

Petitioner's right to intervene is based upon section 11. chapter 62, Illinois Revised Statutes 1945. This right is restricted to persons claiming to be owners of or having a direct interest in the property or funds held by the garnishee, and is not available to a simple contract creditor. May v. Discento Gesellschaft, 211 Ill. 310, 316, Petitioner tried its case on the theory that it was the owner of this particular fund. Its rights must be determined by the written agreement between it and defendant. This agreement contains no provisions for the keeping of the proveeds derived from the presentation of the show, except that they should be turned over to the No right or interest in the proceeds, as such, is producer. given to the Council. After the presentation of the rodeo defendant contracted to submit to the Council a full and complete audit and statement of all receipts and disbursements whatsoever in connection with the production, and to immediately pay over and deliver to the Council such amount or amounts as shall be found to be due to the Council as its one-third of the net profits of the production. The Council cites no authority in support of its claim of swnership of the fund. The contract does not create such ownership. Defendant is left free to exercise his judgment in the preservation and safekeeping of the proceeds received by him and as to the disbursement of them. He is under no obligation to account to the Council until after the presentation of the rodec, when he is required to pay over to the Council the amount or amounts found to be due it as This merely creates the relation of its share of the profits. debtor and creditor. Had the bank in which defendant made his deposits failed, or had the money been stolen without fault of defendant before he had deposited it with the bank, the loss. arising therefrom would have to be borne by the defendant alone. Petitioner therefore was without right to intervene in the

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Petitioner's right to inverses is seed upon section 11, chap or 32, Illinois Wevised Stanutes less. This right is restrand to be sterned of it main als anosted of Setointser direct interpat in the property or run a near by the garnishes end is not evailable to e simply contract sent tor. Ray v. Disconte Gesellschaft, 211 Ill. 80, 30 . Filting this the case or the treery that it as the error of this critical fund. Its right must be diterrived by a corrected astronac between it and defendablt. Pain eares out contract provinting Low big teaming of the protected deprived finances of the of the Adors, encept that they should be samed come to ane producer. No right or interpet in thir first . . we sack, ie eiren to the Council, with the nervous or of the rose roses ceffer dant contracted to submit to the Commonly : Pull and nomolete and the and officered of all consists and the acceptance of a distance in connection with the reservoir o, and a large of range over ad leade to establish to follow for a fiction of of revised bas found to be due to the " soull is in ores that if it is now profite of the production. Che oftend where we surported to so wither at a contract to dispersors to while at the drongua does not ereate such and reath. The state of the to in maliannatia na. Troduvionasta odi ni inamphaj ali amionaxa the proceeds research by him and as to the distancement of them. reth. Firm lie, we main at descent at most spile or metry at eg the prosentation of the modeo, when it is mustiful to pay over to the Council the are no or whom's found to or due it as ite seare of the profits. This descipance as the relation of Had the back to shich defendent ands debtor and creditor. his deposite failed, or had the money been stolen without fault of defendant before he had deposited it with the benk, the loss had arising therefrom would have to be borne by the defendant alone. Petitioner therefore was without right to intervene in the

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garnishment proceeding.

The judgment is reversed and the cause rewanded with directions to enter judgment against the garnishee in favor of defendant for the amount of the funds in possession of the garnishee.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and O'Connor, J., concur.

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garmishment proceeding.

The judgment is reversed and the cause re anded thin directions to enter judgment against the permishes in norsession of the garnishes.

. SPOITOS IN PORT THER SPECIAL GROUNDER

Matchett, P. J., and D'Conger, J., concer.

MARJORIE E. SHEFFIELD,
Appellee,

V.

CITY OF CHICAGO, a Municipal Corporation, JOSEPH WINKLER and PAIGE WALLACE, Incorporated,
Defendants.

On Appeal of CITY OF CHICAGO, a Municipal Corporation,

Appellant.

APPEAL FROM SUPERIOR COURT COOK COUNTY.

32 J.A. 321

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant City of Chicago appeals from a judgment for \$5,000 entered against it and Joseph Winkler upon the verdict of a jury in an action for personal injuries sustained by plaintiff, who fell into a coal hole in a public sidewalk in front of the property of Joseph Winkler in Chicago. No testimony was introduced on behalf of the defendants.

Plaintiff, who was employed by her husband, left his place of business in the company of a fellow-employee and walked to the intersection of Orleans street and Grand avenue with the intention of taking a street car home; it was about 10:30 p. m. on a cold night, and no street car being immediately available they walked eastward on the south side of Grand avenue a little over a block to a point in front of defendant Winkler's property: there was a coal hole in the center of the didewalk in front of this property; it was covered with a metal cover; as plaintiff stepped on the right side of this cover it tipped up, turned over and rolled away and plaintiff went down into the hole about half way up to her thighs; she had never been over that sidewalk before and did not know the coal hole was there: there was no light in front of defendant Winkler's building; there was a light on the southwest corner of Wells and Grand avenue, about 70 or 75 feet west of the place of the

MARJORIE E. SHEFFIELD, Appellee,

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CITY OF CHICARO, a municipal Gorporation, JOSEPH WINGER and PALGE WALLACE, Incorporated, Defendance.

On Appeal of GITY OF CHICAGO, a Municipal Corporation, Appellant

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MR. JUSTICS MISMAYET DELIVE OF THE TOTAL OF THE STATE OF

Defendant City of Thicago anneals area a judament for \$8,000 entered against it and Joseph Harles upon the ye first of a jury in an action for personal injuries such and by plaintist, who fell tate a coal hule in amble also action in front of the property of Juseph Linkley in Chicago. (1) togithory was introduced on behalf of a defendance.

Flaintiff, who was smaloved by ner and and, I of his place of business in the company of a failox-employee and walked to the intersection of Orleans street and Jound avenue succe per ti temped the terries a smiker to notinetal ent ditte 10:30 p. s. on a cold night, and no street car being traced tely available they walked castward on the south side of Grand avenue a little over a block to a voint in front of defendant Windler's property: there was a coal hole in the center of the didesalk in front of this property; it as covered with a metal cover; Beggil if tevoo shid to oble interest to beggit aftinisig as up, turned over and rolled aver and plaintiff went down into the half about half way up to her thighs; she had never been over that sidewalk before and did not knew the coul hole was there; there was no light in front of defendant Winkler's building: there was a light on the southwest corner of and Grand avenue, about 70 or 75 feet west of the place of the

accident, and a small street light on the other side of Grand avenue about 85 or 100 feet east of Wells street; there was no defect in the sidewalk adjacent to the hole; the sidewalk for at least 2 or 3 feet on each side of the coal hole was covered with small particles and lumps of coal and coal dust; plaintiff could not see far ahead of her because she was in her own shadow; she could see the sidewalk and the black colored coal on it; she felt the crunching of the coal under her feet for a distance of 2 to 4 feet before she fell; she was not alarmed by the crunching, and in response to the question on cross-examination, "That is just natural for you to walk along and start over that, and you were not on your care at all," she answered, "Yes."

A witness who had lived on Grand avenue for a number of years testified that the coal hole involved here was in front of her house, a few feet from the doorway; that the coal hole cover did not fit; it was about 2 inches too small for the hole; that such condition had existed over 5 or 6 years; that on one occasion she had stepped on the edge of the hole and noticed that the cover raised about 2 inches; that she always walked around the coal hole.

Plaintiff restricts her right to recover to the charge in her complaint that "The defendants then and there carelessky and negligently kept and maintained said hole in said sidewalk and the cover over the same in a loose, insecure and unfastened condition." This charge covers the conditions shown by the testimony, and defendant's objection on that point is untenable, as is its objection that the conditions shown indicate a latent defect with which defendant could not be charged in the absence of direct notice or knowledge. Defendant further contends that plaintiff's answer to the question quoted above was a judicial admission of want of due care on her part, foreclosing recovery

sectiont, and a small street light on the other side of drand seeme about 85 or 100 feet east of Wells street; there as no defect in the ridswalk adjacent to the hole; the sidewall for at least 2 or 3 feet on each side of the coul hele was covered with small particles and lumis of cont and out the sation of statistic could not see far aread of her occases the satin her own shadow; she could see the citiesalk and the shade of her feet of and on it; she felt the crunching of the coul ander her feet for a distance of 2 to 1 feet refore suc fel.; she see not starmed by the crunching, and in resconse to the duest and carass-examination, "That is just natural for a to the duest and carass-examination, "That is just natural for a to the duest of all," and answered, "Yes."

A witness who had lived on Frand avenue for a summer of years testified that the cost hole involved here are in front of her house, a few feet from the door as; that the cost fit; it she about a instead one shall for the bole that guen condition and existed over bor a reser; that occasion she had ate oed in the above the cover raised about 3 inches; that ere alrays walked around the cover raised about 3 inches; that ere alrays walked around the cover hole.

Plaintiff regarded nor right to record to the content in her complaint that The defendants then on the considerand negligently kept and maintained feld her is said oiderable and the cover over the ease in a loose, in acure and untarbased condition. This charge covers the condition of them by the testimony, and defendant's objection on that toint is untoughle, as is its objection that the conditions shown indicate a latent defect with which defendant could not be charged in the abrence of direct notice or knowledge. Defendant further contence that plaintiff's answer to the question quoted above was a judicial admission of want of due care un her part, foreclosing recovery

by her. The most that can be said from defendant's standpoint of plaintiff's answer to the rather clumsily worded question put to her on cross-examination, is that the answer was the statement of a conclusion and not a fact, and therefore not binding upon her. Pienta v. Chicago City Ry. Co., 284 Ill. 246, 255-256; Central Ry. Co. v. Allmon, 147 Ill. 471, 480-481: People v, Pfanschmidt, 262 Ill. 411. Whatever plaintiff's opinion may have been, she was entitled to have her case submitted on all the facts before the jury, even though some of them may have been anconsistent with her testimony. In People v. Scalisi. 324 Ill. 131, 145, the court said: "Plaintiffs in error were entitled to have the jury instructed not only as to the law applicable to the state of facts testified to by them, but applicable to any state of facts which the jury might legitimately find from the evidence to have been proven. A defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony." The question of plaintiff's lack of due care was a question for the jury (City of Chicago v. Babcock, 143 Ill. 358; Puck v. City of Chicago, 281 Ill. App. 6), and upon the record before us we are bound by the verdict.

Defendant's next objection is that the verdict is excessive in that the jury was permitted to consider as damages earnings lost by reason of plaintiff's inability to work for her husband, and hospital expendes which had been paid by plaintiff's hudband, and the doctor's bill, and that the judgment entered should be reduced by the amounts of these items. The testimony covering these items was received without objection. No motion was made to strike the testimony and no instruction tendered directing the jury to exclude it in consideration of the damages,

by her. The most that can be said from defendant's otangoist of plaintiff's server to the retuer clustify sorted ourstion put to her on cross-examination, 'e that the ansect was the statement of a conclusion one not a fact, ent himseles not binding upon ber. Fishis v. Shings 1111 fy. 14., 184 Ill. 246, 255-256; Central TV. Cu. v. Allera, 147 111. 171, 480-491; Pagple v. Pranschmidt, 286 Ill. 411, . . towar oldindreto . titon may have been, one was contilled to new har the calmitted or all the facts before the jury, sied though work of thom may have been inconnictent with her tearing, in 10 2002 v. Coslist, 324 INT. 121, 146, the court gab : "Historiffe for one were entitled to have toe jury inv ructed not only and the life applicable to the state of facts t gills in the time, but gies triped on to get i our colds about to stada you of olderliggs find from the sylderce to have been amorem. In the table entitled to the senciit of any deflance as in it is online evidence, even if the facts on which even being to have a coninconsisters with the definition of the consistence and attended grui ent ret cotte-up. Her ares aut to Most ettiiinisic to (Gity of Chicago v. Esbrech, 145 ill. 350; Puck v. Gly of Chicago, 281 III, Ann. C., wit woon whe had the legar was we are bound by the verciet.

leftendant's next objection in the virging is considerated in that the jary was permitted to consider as large are jary was permitted to consider as large for an impact, left by reason of claimfiffs (nobility to week for an impact, and hospital expenses which had been suid by lainfiffs andband, and the doctor's bill, and that the indeest entertained should be reduced by the amounts of these items. The testimony evening these items was received without objection. No motion was made to strike the testimony and no instruction tendered directing ing the jury to exclude it in consideration of the damages,

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if any, to be awarded. The present objection is purely an afterthought and cannot be considered.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

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if any, to be awarded. The present objection is omely an afterthought and cannot be considered.

The judgment is uffirmed.

ASTERNOO.

Matchett, F. J., and O'Gonnor, J., cancur.

43474

R. S. SCHERMERHORN and ROBERT A. YOUNG, Co-partners, Trading as Schermerhorn-Young Sales Company, Appellees,

V.

ROLYAN CORPORATION, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY,

328 I.A. 822

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

1

Plaintiffs filed their complaint in chancery against defendant alleging that on June 13, 1941, they entered into a written agreement with defendant whereby they were to be the bales'representatives of defendant in the states of Texas, Oklahoma, Arkansas and Louisiana; that they performed services and that under the terms of the contract they were entitled to commissions some of which, aggregating \$12,010.51, had not been paid. They prayed for an accounting and a decree for the amount found to be due.

Defendant denied that it owed plaintiffs any sum but on the centrary plaintiffs were indebted to it for certain merchandise sold and delivered for \$86.52, which was due and unpaid and that complainants be decreed to pay. The case was heard before the chancellor and a decree entered against defendant for \$6,949.89. Defendant appeals and plaintiffs file a cross-appeal by which they claim that the court should have allowed interest on the amount found due from defendant from March 27, 1943 to March 22, 1945, the day the decree was entered.

Counsel for defendant in their brief admit that under the evidence defendant was indebted to plaintiffs for \$1,234.09 and

2. 5. SCHEHMFILIORN and RODERT A. YOUNG, Co-partners, Frading as Schermerhorn-Young Sales Joupeny, Appelless,

\* V

ROLYAN CORPOPATION, a Corporation,

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TILE TOO TOO BUILDEDS LEE

Plaintiffs filed to elected in the observe wavelest defendant alleging that on dure 18, 1741, they entered into a written agreement with defendant charely they entered the the bales representatives of defendant in the states of large.

Oklahoma, Arkansas and Louisiana; that they performed services and that under the terms of the contract they perform entitied to commissions some of they, a contract they wave entitied to commissions some of they, a contract they decree for the bear paid. They prayed for an accounting and a decree for the amount found to be due.

Defendant denied tagt it owed alighte any sum but on the centrary plaintiffs were inactived to it has a rectanding sold and colivered for 286.52, which are due ind unraid and that complainants be decreed to may. The case was agant before the chancellor and a decree sate of systact de consumment of 3,049.49. Defendant appeals and plaintiffs file a cross-speed by mich the court should have allowed interest on the amount found due from defendant from larch 27, 1845 to a rein 25, 1945, the day the dacree was entered.

Counsel for defendent in their brief a mit that under the evidence defendent was indebted to plaintiffs for 1,234.09 and

that the court erred in entering a decree for more than that sum.

The record discloses that plaintiffs are co-partners. trading as Schermerhorn & Young Sales Company, having their place of business at Ft. Worth, Texas. That Schermerhorn lives in Dallas and Young in Ft. Worth, Texas: that they are agents for a number of companies in some of our southwestern states and have been in business since 1939, doing business principally by selling supplies to retail companies in that vicinity. Defendant. Relyan Corporation, is an Illinois corporation with its principal place of business in Chicago. E. M. Naylor, pr sident of the defendant company, has been connected with the oil business since 1928: that before the date of the contract, entered into between the parties June 13, 1941, it sold its own repair plugs and mechanical rivess in Texas, Arkansas, Lauisiana and Oklahoma; that in 1938 defendant began to push the sale of its repair plugs by advertising and direct mail literature to the oil industry and had obtained a number of customers in the oil region.

June 13, 1941, the parties entered into the written contract which is the basis of this suit. It was prepared by defendant and provides: "Commission Set-up - Multi-Seal Repair Plugs Jobber Sales

"On sales of Multi-Seal Repair Plugs to jobbers, we will pay you ...... 155

## "Consumers Sales

\*On sales of Multi-Seal Repair Plugs to consumers, we will pay you ...... 30% \*\*\*

## \*Commission Set-up -- Rolyan Mechanical Rivets

"Rolyan Mechanical Rivets are, for the most part, sold directly to the consumers, we have no jobber set-up on them." And that the selling price varied according to the quantity sold ranging from 25% to 10%.

The contract continues: "You have asked for the States of

that the court erred in entering a decree for more than that sum.

The record discloses that plaintiffe are co-partners, trading as Generalizate & Young Sales Couragy, haring train place of business at Ft. Worth, Teras. That Schermerhorn lives in Dallas and Young in Ft. Jouth, exact that they are agente for a number of companies in some of our southwestern often and have been in business since 1989, do'ssr beriesse principally by eelling ou. line to ret. il commandes in thut vicinity. Descart, Rolyan Corporation, in an Illimois componition with ite vriceinal place of buginess in Chicago, W. . Paylor, or sident of the defendant company, has been consected with the oil business cince 1928; that before the date of the confluct, entreed into bet wen the parties June 13, 1941, it wold its our repair lugs sadmechanical riveža in Terac, arkuncuc, Louislaus and Oklukona: that in 1938 defendant began to pure the refe of the recip lluge by advertising and direct mail literature to the oil inductry end had obtained a number of gustomers in the cil region.

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"On sales of Multi-jest Remain Flags to jobuers, se will pay
you ...... 155

\*Congumera Salas

"On sales of Rulti-Seal Herair Tjurg to consumers, we will pay you ...... 30% \*\*\*\*

Minister Set-up - 601van echanical Rivers

"Rolyan Mechanical Mivers are, for the most part, sold directly to the consumers, we have no jobser set-up on them." And that the selling price varied according to the quantity sold ranging from 25% to 10%.

The contract continues: "You have asked for the States of

Texas, Oklahoma, Arkansas and Louisiana. If you are really covering all four States, we will gladly assign them to you, with the understanding, however, that if it develops that you are not in position to really cover all this territory, we are to have the privilege of withdrawing any part of it, which we feel is not being properly covered by you.

)

"Effective immediately, we will start sending you copies
of all invoices covering direct sales of \*\*\* Plugs and \*\*\* Rivets
to both jobbers and consumers, allowing you the full commission
on them. We will also give you a brief memorandum on the direct
accounts we have in your territory just as rapidly as we can,
so that you will have the background on each individual account;"
that defendant would send commission checks as near as possible
on the 10th of each month covering shipments made the previous
month.

"This sales agreement is to stand until cancelled in writing with the understanding that either party is to have the privilege of cancelling on thirty days notice."

Upon the execution of the contract the parties began to operate under it. The orders which plaintiffs obtained were sent to defendant, others came direct to defendant and both parties agree that plaintiffs were entitled to commissions on all of the sales until March 12, 1943 being 30 days after February 10, 1943, when defendant wrote plaintiffs a letter advising them that it had appointed John C. Owen sales manager, "in charge of repair plugs and mechanical rivet sales and have instructed him to institute a much more intensive campaign for repair plugs and mechanical rivet business," And the letter continues: "In order to clear the decks and give him [Owen] a free hand in working out his sales plan and lining up his distributors, we are cancelling all of the old sales agreements.

"This letter, therefore, is to notify you of the cancellation of our sales' agreement with you dated June 13, 1941, in accordance

Texas, Oklahoma, Arkansas and Louisiana. If you are really covering all four States, we will gladly assign them to you, with the understanding, however, that if it develops that you are not in position to really cover all this territory, e are to have the privilege of withdrawing my pa t of it, which e feel is not being properly covered by you.

\*Effective immediatily, we will start reading you capter of all invoices covering direct sales of whe plays and ask divers to both jobbers and consumers, allocated pour solutions on them, we will also give you a brist remain stan on the direct accounts we have in your be "italy just be read by as as can, so that you will have the background on auch individual account; that defendant sould send coordination checks as soon as not previous on the 10th of each month covering shipments aske the previous agonth.

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"Tais letter, therefore, is to notify you of the cancellation or our cales' nersonent with you dated June 13, 1941, in scropdance

with the terms thereof." That Mr. Owen would call on plaintiffs at the first opportunity in working out some modified form of the agreement to cover whatever territory plaintiffs and Owen might "decide you can effectively and intensevely handle for us. The final decision on this matter will, however, have to rest with Mr. Owen.

"Pending his visit with you we will be very glad to continue to pay you commissions on all orders which you send us; or which customers which you have established for us, send us direct.

Personally I greatly appreciate the friendly cooperative fashion in which you have always tried to work with our little company, and look forward to doing business" with plaintiffs for a long time to come.

Eight days later, on February 18, plaintiffs wrote defendant a letter in reply to the letter of February 10, in which they said: "It was a pleasure to receive the letter from you. You advise us appointment of Mr. John C. Owen as a new Sales Manager, 'to institute a much more intensive campaign for Rolyan Multi-Seal Repair Plugs.' Whatever is best for the Rolyan Corporation we are sure will be best for the Schermerhorn-Young Sales Co. We welcome Mr. Owen. We hope everything works out fine for all the Rolyan Corporation, Mr. Owen and the Schermerhorn-Young Sales Co. - for - as Rolyan Corporation goes, we all go - and may it be - Fine Going - of Rolyan Products.

"It was interesting that we all were of one mind, in that we had just concluded the program of a mailing campaign of over three thousand. We ordered a small stock of Rolyan Products in, to ourselves for immediate rush consumption, and much of the literature was out and the remainder ready waiting additional literature of Rolyan products when your letter came. \*\*\*\*

"We hope to soon have the pleasure of personally meeting Mr.

with the terms thereof. That ar. Uses sould call on all intiffe at the first opportunity in rorking out some modified form of the sgreement to cover whetever terminor philadifferent ) and might "decide you can eith dively and into thereby be not first decision on this maken will, he cover, over the first decision on this maken will, he cover, over the first decision.

\*Pending his virit with y was will some yied to could de to pay you commissions on will order maded to rend us; on then customers which you have ratefultabed for the control of the first production for the formally of the cities the fitten or title count in which you have alrays that it is now that now ittell count of and look furnard to dote, and now it is a first come.

Sight days learn, on a runny 10, a descripte another of underly sales or it comply to the letter of an arry 10, 1 and they said: "It was a colesceurs to a colesceur of an action of a record of

"It was interpolity that e old arread one eden, in that we had just concluded the progres of a saill generally of over three thousand. We ordered a small stock of Arly norothes in to curseives for impedente much consumntion, and much of the literature was out and the remainder resery siting additional literature of Folyan products when your letter ones.

We hope to soon have the pleasure of someonally meeting ir.

Owen and to have things worked out to our mutual benefit."

March 22, 1943, Rolyan Corporation, by Owen, its sales manager, wrote plaintiffs a letter in which it was said: "We note with pleasure your mail campaign on Multi-Seal Repair Plugs. We are likewise pleased to note your statement concerning the favorable returns." Then fablow other matters and the letter continues: "It has been my intention to contact you with a view to setting up a new working arrangement on Multi-Seal Repair Plugs." But on account of press of business and Mr. Naylor's illness, he was unable to do so. "Since I believe it is our mutual desire to sell direct to large industrial users and, secondly, to line up resellers, we would like to have you give some thought in the direction of the type of resale houses which you might establish within an area that you intensively cover. \*\*\*

"Since the cancellation of your former working agreement we have only received one small order from a mill supply house in your vicinity. There is an intimation in your letter that you believe that much business might be forthcoming from your area of operation direct into our office and we presume you would like to gain compensation for the activity that you are putting forth. We likewise agree with you that you are entitled to this reward but the working out of an arrangement naturally depends upon the area that you cover intensively."

March 26, 1943, four days after the letter last quoted from, defendant wrote plaintiffs another letter in which it was stated: "A letter has just been received from the Maloney Tank Manufacturing Company in which they relate that your Mr. Robert A. Young called on them on March 24th (the date of their letter). They state that they were quoted by Mr. Young our list prices less a discount of 35% on the 1/2" diameter Multi-Seal Repair Plugs. Mr. Young further indicated, according to their letter, that

Owen and to have things worked out to our autual benefit."

March 22, 1943, holyan Corporation, by Gran, its cales manager, wrote plaintiffs a letter in which it was asid: "To note with pleasure your sail campains on "Thi-Beal Repairflure. We are likewise pleased to done your statement consensing the favorable returns." Then flatlow other call over and the litter continues: "It has been my intersion to dont of you sit a vier to setting up a new working arrangement on a 101-Beal Beastr Plugs." But on account of prose of bu insertant 1. Haylow's filmess, he was unable to 30 au. "Cines a believe and a laylow's nutual dealers to sell directed to large intersection assers and, contactly, to line up resolver, we would him to large intersection of the type of results in the direction of the type of results in the results of the first type of the first t

"Since the nancellation of y or former sowing care north or have only received one easil order from the tell surply house in your vicinity. There is an intimetion in your last that much business which he forthered from your area of operation direct into our office and se presume you sould like to gain compensation for an active that you are outling forth. We likewise arree with you are nather some reward but the working out of an examplessationating cover intensity of accountly dependent upon the area that you cover intensity."

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Mr. Young further indicated, according to their letter, that

'list price applied only when Multi-Seal Repair Plugs were used by the purchaser, but when they were for resale and were purchased in large quantities the discount of 35% applied'.

\*Since we hade cancelled your working arrangement, your representative had no right to establish any new perchandising sales outlets for Multi-Seal Repair plugs. As a matter of fact, we have written you on numerous occasions asking for certain vital information concerning your methods of sales operation and area coverage which might have lead [led] to our setting up a reasonable working arrangement within an intensified area which you might handle, but this information has never been forthcoming.

"In our cancellation letter of February 10th we told you only that 'we will be glad to continue to pay you commissions on all orders which you sent to us; or to customers which you have established for us sent direct to us'.

"Further, as a matter of fact, Maloney Tank Manufacturing Company could not be classified as a jobber-resaler and therefore is not entitled to a jobbing discount as indicated on our yellow colored 'jobber's cost sheet'. \*\*\*

"Since we introduced and developed Multi-Seal Repair Plugs with this company we feel that the action taken by your representative in his contact of this company was entirely out of order and places us in an unwarranted, embarrassing position with our customer. We see no alternative but to discontinue all discounts to you on products of our manufacture effective as of the date of this letter. This letter will therefore serve as our notification of this action."

In the second amended complaint, on which the case went to trial, the accounts of a great many persons are named on which plaintiffs claim commissions, making a total of \$12,010.51, but in the briefs it is conceded that only the accounts of two of these customers are involved, namely, the Maloney Tank Company and Black,

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list price abolied only when Multi-Seal Repair flugs ere used by the purchaser, but when they were for resole and were purchased in large quantities the discount of 55% ephlich!

"Since we had owncelled your working arrangement, your representative had no right to establish and not percountiaing sales outlets for Multi-Seal Nathalage. As a matter of fact, we have written you on agreeous discous asline for entain vital information concerning your methods of siles analytical and area coverage which might have lest field to our setting us a area coverage which might have lest field to our setting us a reasonable working arrengement within an interpitted area which you might candle, but this lateraking here forthcoming.

"In our esneellation lates, of cabruary letters to the religion on only that 'we will be glad to continue to the van all orders which you want to us; or to evaluate which you early to us; or to evaluate of tor us early innet to us.".

"Further, as a mai'er of fict, whore sand sandartaning Company could not be elaseifich as a jacker-resalar and this afora is not entitled to a jubing discuss a indicessor on pellow colored jobber's cast sheet!

"Since we introduced and developed built-3eal manair lugged the this commany or feel that the action taken by your ripresentative in his contact of this commany was entirely out of order and places us in an unwerranted, embarranted position ith our customer. We see no alternative but to discounts to you on products of our manufacture effective as of the date of this letter. This letter will therefore serve or our netification of this action."

In the second amended complaint, on which the case ent to trial, the accounts of a great many persons are named on which plaintiffs claim commissions, making a total of \$12,010.51, but in the briefs it is conceded that only the accounts of two of these customers are involved, namely, the Malchey Tank Gospany and Black,

Sivalls & Bryson.

Plaintiffs' theory, as stated by their counsel is that:
"Under plaintiffs' original contact of employment [June 13, 1941]
with the defendant, plaintiffs were entitled to receive a
commission of 15% on all such 'jobber accounts,' and a commission
of 30% on all such 'consumer' accounts, originating from the
plaintiffs' territory up to March 12, 1943, the date of the conditional termination of the contract.

"Thereafter from March 12, 1943, to and including March 27, 1943, the plaintiffs continued as defendant's sales representatives on the basis of the terms of defendant's letter of February 10, 1943, as interpreted and expanded by their subsequent letters to the plaintiffs, and more particularly by defendant's letter of March 22, 1943. On that basis, the tank company orders, to-wit, Maloney Tank Co. and Black, Sivalls & Bryson-received by the defendant between March 12, 1943 and March 27, 1943, were 'consumer' accounts established by the plaintiffs, and plaintiffs were entitled to a commission of 30% on those orders.

"Plaintiffs not only established the Maloney Tank Co. and Black, Sivalls & Bryson accounts, within the spirit and letter of the contract of employment with the defendant, but defendant is estopped from controverting that claim by its own written admission of March 22, 1943,"

On the other hand defendant's theory of the case, as stated by its counsel is: "that it terminated the original agreement [of June 13, 1941] on March 12, 1943 by a letter dated February 10, 1943; that this letter created a new agreement whereby plaintiffs were thereafter entitled to commissions only upon orders obtained by them or sent in directly by customers which had been established by them; that the Maloney Tank Company and the Black, Sivalls & Bryson accounts were not established by the plaintiffs; that this new arrangement was terminated by defendant on March 27, 1943; and that plaintiffs were entitled to no commissions thereafter.

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Sivalla & Sryson.

Plaintiffs' theory, as stated by their councel is that:
"Under plaintiffs' original contect of employment founce 11, 1941.]

with the defendant, claintiffs were ent the to recolve a

commission of 15% on all such 'jobec accounts, and a contract
of 30% on all such 'consumer' accounts, originalize for the
plaintiffs' territory up to rereb 15, 17%, the date of the con-

"Thereaffor from overal, 10%, to in inclining the S7, 10%, the inclining the S7, 10%, the plaintiffs equivaled as enforwardle soles according to the time on the basis of the terms of acts of acts of the order of terms of the soles of the interpreted and the excepted by their resemble latter to the element of the soles of the term of the element of t

"Plaintiffe not only save Dianed the alones in to and Black, Sivalle & Eryson accourt, with the solutional Leter of the contract of exployment lith the defoudant, for colonard is estopped from contract or that claim by its evaluation that claim by its evaluation of Earch 28, 1860."

On the other band defendent's theory of the order, as stared by its councel is: "that it foredoated the original agreement [of June 15, 1941] on dered It, 1943 by a letter dated formary 10, 1942; that this letter unested a not agreement thereby elaintiffs were thereafter estitled to confidence only upon orders obtained by them or sent in directly by customers which had been established by them; that the Maloney Tank Jospany and the Black, divalle & Freen accounts were not established by the plaintiffs; that this that oldnatines by defendant on March 27, 1945; and that plaintiffs were entitled to no consissions thereafter.

"Defendant also contends that the 'tank companies' were not consumers withingthe meaning of the employment agreement, but were jobbers, and that plaintiffs' commission on their orders should therefore have been only 15 per cent."

We hold that the contract of June 13, 1941, was perminated by defendant March 12, 1943, which was 30 days after defendant wrote plaintiffs on February 10, 1943, that it was cancelling the contract. Under the contract plaintiffs were entitled to a commission on all sales of plugs sold by defendant in the four states covered by the contract, whether the orders were obtained by plaintiffs or not. If the plugs were sold to jobbers, plaintiffs' commission was 15% and if sold to consumers, 50%. After March 12, however, plaintiffs were to feceive commissions only on all orders which plaintiffs sent to defendant or to customers who sent their orders direct to defendant which customers plaintiffs had obtained. And the arrangement which terminated March 12, 1943, was cancelled by the letter which defendant wrote plaintiffs March 26, 1945.

The two questions for decision are: (1) Were the defendant's sales to the two tank companies, Maloney Tank Company and Black, Sivalls & Bryson, "consumer sales" within the meaning of the voontract of June 13, 1941, and (2) Were these sales made or "established" by plaintiffs? If the sales to the two tank companies were "consumer sales" within the meaning of the contract and the orders were obtained by plaintiffs from the two tank companies, plaintiffs would be entitled to 30% provided they also "established" or secured these two sales.

The evidence shows that the two tank companies were engaged in manufacturing and sellingttanks, and the two tank company accounts involved were sales of tanks made by the tank companies to the United States Government. There is evidence to the effect that the Navy Department had made some tests of defendant's plugs and after Pearl Harbor defendant again took up personally, with

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"Defendant also contends that the "tink normalis" and opening the meaning of the enliquent agreement, but seem jobbers, and that all intalities could should therefore have been only 15 agreement.

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the Navy Department the question of using defendant's plugs. And since defendant's plugs could be inserted from the outside of the tank without draining its contents and if holes were shot in the tanks they could be easily plugged, the Government approved the use of the plugs which they named "patch bolts." At first the Government purchased directly from defendant some of the bolts for use with the tanks it had previously purchased; later the Government provided in its specifications that with each tank there should be furnished one or more sets of tooks, each to include 24 patch bolts. The tanks would be made and sold by the two tank companies, together with some of the bolts, to the United States Government and the Government would use the bolts in case the tanks leaked. Under this state of facts we think it clear that neither of the tank companies can be said to be a consumer of the plugs - the Government was the consumer, and therefore the plaintiffs, under the contract, were not entitled to more than 15% provided they established or obtained the orders. We think the trial court erred in holding that the sales to the two tank companies were consumer sales, Bradley Supply Co. v. Ames, 359 Ill. 162; American Optical Co. v. Nudelman, 370 Ill. 627; Revzan v. Nudelman, 370 Ill. 180. And this conclusion is not affected, as counsel for plaintiffs contend, by the testimony of Doris E. Eklund, who was called by plaintiffs. She testified that she was former secretary and co-manager of the defendant Company until 1942: that where a customer of defendant did not receive a discount it was a "consumer" and plaintiffs were entitled to a commission of 30%, that if there was a discount, the customer was classified as a "jobber" and plaintiff entitled to a commission of 15% and that this was the practice defendant followed in billing purchasers. There is other evidence to the effect that Mr. Naylor, president of the defendant company, knew the customers and whether they were buying for their own use or to repair their own equipment for resale, and b od on this knowledge, he classified the accounts.

the Mary Decartment the question of using defendantle clust. And since daten ant's pluye could be inserted from the outside of the tank without draining its contents and if holes were shot in the tanks tray could be as ily lumed, the Toyennent approved the use of the live which thet named "raten bolts." At first the Grenagest purchased di enly from defeadant no musi the bolts for use with the tente it is a proviously surel car; later the Covernment crovided in its a maifications that vith each tank there abould be furnished one or note sets of tooks, each to include 24 match bolte. That have not be made and sold by that two team concunies, tope term is one of the bolic, to the laited States Government and the Government and the molte in days the tan a leaker, ofer but, this of other tiles is clear that neither of the tank cot unies and to said to us a consuper of the plura - the Colemnatical tention of the plura profess. the pleintiffs, under the contract, one not outliffed to the than 18% provided they rated tot or obtained the orders. think the trial court eccesting a Times that the subset to the tank commanies were consumer relet. Inchey burly do. v. story 359 111. 162; samiosa i tigal U . v. quoch se, che 11. 327; Revann v. Entelion, 870 III. 183. And this e main ion in not affine ted. as counsel for Meintiffs content, by two testinony of Doris .. Exland, who was sailed by plaints is and bestifict tout and real former secretary and co-manary of the defendant bow any until 1942; that where a customer of delendant ald not receive a discount noicala co e of beliline are affiliale has "remuseco" a saw ii of 50%, that if there was a discount, the customer was clarafiled but "31 to neighbor" and plaintiff entitled to a countrain of 15" and that this was the practice defendent followed in billing purchusers. There is other evidence to the effict that in Taylor, president of the defendant company, knew the customers and whether they were buying for their own use or to repair their own equipment for resale, and b , weren this knowledge, he classified the accounts.

We think this evidence does not justify the conclusion that the contract between the parties of June, 1941, should be construed to mean that the two tank companies were consumers of the patch bolts.

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(2) Were the sales to the tank companies involved in the instant case "established" or secured by plaintiffs? Between March 12 and March 17, 1943, defendant received direct from the Maloney Tank Company orders amounting to \$4,484.40, and from Black, Sivalls & Bryson, \$10,296. The trial court found that these two sustomers had been established by plaintiffs and allowed them a commission of 30%. We hold this was error.

One of the plaintiffs, Mr. Young, testified that in July or August, 1942, he called at the Maloney Tank Company office at Odessa, Texas, and about the same time, called ono Mr. Highfill, its purchasing agent, at its main office in Tulsa, Oklahoma, and the latter gave him his card; that the next time he called on Mr. Highfill was Just before plaintiffs had received defendant's letter of March 26, 1943, at which time, Mr. Highfill "threw the invoices out on the desk" and showed all he had purchased direct from defendant. That the first time he called on the Maloney Tank Company was about 6 months before the tank company bought any of the plugs; that the next time he called on the tank company was in March, 1943.

Defendant took the deposition of Mr. Highfill, the purchasing agent for the Maloney Tank Company. He testified that he received a letter from defendant dated February 6, 1943, stating that defendant had patch bolts specified in Government tanks for sale, and soliciting the Maloney Tank Company business. That two days later, February 8, he telephoned defendant in Chicago and sent it a written order by mail on the same day, for some of the plugs. Under these facts we think it appears that plaintiffs first attempted to secure an order from the Maloney Company about July, 1942, but were unsuccessful and they did nothing further until

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e think this evidence does not justify the conclusion that the contract between the perties of June, 1941, should be construed to mean that the two tank companies were consumers of the patch bolts.

(2) Fere the sales to the tank companies involved in the instant case "established" or secured by phintiffer heteem March 12 and March 17, 1040, defendant received direct from the Maloney Tank Company orders amounties to 14,406.40, and from lack, Sivalls & Bryson, \$10,200. The total court found that there are sustained been entablished by the last from allowed the sound sector of 30%, we hold the same answer.

One of the plaintiff, it round, restified that in July or August, 1942, he called the street of y land languary office at Oceasa, Texas, and about the called time, and look onear. Birhill, its purchasing agent, at its main office in Thiss, whichill, the latter gave him his one card; for the next time he called on the lightill was just before thintiffs had received defendant's latter of harch is, 1945, at shich time, m. indicitl "three the invoices out on the lest" and showed all he hed nurchased direct from defendant. That the firefalling he called on the Keloney from defendant. That the firefalling he called on the Keloney any of the plugs; that the next time in called on the lank company was about 6 months before on the lank company was in harch, 1945.

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after the account had been secured by defendant.

As to the claim that plaintiffs established or obtained the account of Black, Sivalls & Bryson, Mr. Young testified that he called at their branch office at Graham, Texas and showed their representative the plugs. That "when I first called on them, they had no need for plugs. After we found out that they did not use any plugs we did not call on them as we did on the supply stores." That between June 13, 1941, and the end of March 1943, he called on some of the branches of the Black, Sivalls & Bryson Company at their offices in Kansas City but not at their principal office in Oklahoma City. That before February, 1943, the only tank company he knew which used any patch bolts was the Lincoln Company, which company bought them from the Mid-Continental Supply; "and then they got a few at Graham, Texas, for Black, Sivalls & Bryson. Until February 1943, when they obtained Government contracts for the sale of tanks, the tank companies had no use for patch bolts."

Mrs. Eklund testified that Black, Sivalls & Bryson purchased patch bolts from defendant for their own use on their own tanks before the summer of 1942 while she was with defendant company; that in 1937 defendant received a small order for a dozen plugs from the Black, Sivalls & Bryson Company; that shortly afterward that company sent in another order for 2 gross of plugs which defendant filled.

As above stated, Mr. Naylor, president of the defendant company since 1928, had been doing business with the oil companies in the four states covered by plaintiffs' contract and had obtained a number of customers through advertising, before the contract was made and he named 20 concerns with which they did business before June, 1941, among which were the Maloney Tank Company and Black, Sivalls & Bryson Company, to which defendant sold plugs as early as 1939. The evidence is further to the effect that in 1942 and 1943, defendant received direct mail orders from the Black

after the account had been secured by defendant.

As to the claim that plaintiffe schablished or obtained the account of Black, Sivalls & Eryson, ir. Young testified that he account of Black, Sivalls & Eryson, ir. Young testified their called at their branch office at maken, texas and chored their representative the plugs. That "when I first celled on them, they had no need for plugs, after te fixed out that they als not use any plugs we did not call on ".sen at we did on the subjy stores." That between Jude 13, 1941, and the end of a wan 1945, no called on some of the branches of the class, itself; a wan 1945, no company at their offices in denses dit; but not at a lerit principal office in Oklahoma Sity. That cefore levers, let at a lecit principal company he have which used any patch bott meet the Lincoln Company, which company bought them from the mid-Continental Supply; "and then they got a few at Graham, Texas, for class, Sivalls & Eryson. Until February 1945, when they obtained dovernment of the text bolts."

Mrs. Etland testified that idack, Givells a crycon our charapatch bolts from infendant for their old use on their old wants before the summer of 1962 wails she was with the endant company; that in 1957 defendant received a small orier for a cosen place from the Diack, Sivalla & dryson Company; that shortly afterward that company sent in another order for 2 grass of place which defendent filled.

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Sivalls & Bryson Company for patch plugs in connection with Government tank contracts through its own solicitation. There is other evidence in the record to the same effect. Upon a consideration of all the evidence, we are of opinion that the orders for plugs of the Black, Sivalls & Bryson Company were obtained by defendant and therefore plaintiffs were not entitled to any commissions after March 12, 1943. Prior to March 12, 1943 the evidence shows that there was due plaintiffs \$1,234.09, which amount defendant concedes is due and unpaid.

Plaintiffs in their cross-appeal contend that they were entitled to interest from March 27, 1943 to March 22, 1945, the date of the entry of the decree, by virtue of Section 2, chapter 74, Ill. Rev. Stats. 1945, which provides that creditors shall be allowed to receive 5% per annum for all moneys after they become due on any instrument in writing or money due on the settlement of account from the date of liquidating accounts between the parties and ascertaining the balance, and a number of cases are cited. But we think this contention cannot be sustained. This is a suit in equity and "In equity, interest is allowed because of equitable circumstances, and isbgiven or withheld as, under all the circumstances of the case, seems just and equitable. Golden v. Gervenka, 278 Ill. 409. Cohen v. North Ave. State Bank, 291 Ill. App. 558; see also People v. Farmers! State Bank, 371 Ill. 222.

The decree of the Superior court of Cook county is reversed and the cause remanded with directions to enter a decree in plaintiffs' favor and against defendant for \$1,234.09.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and Niemeyer, J., concur.

Sivells & Eryeon Company for patch plugs in connection ith Government tank contracts through its own solicitation. There is other evidence an the record to the same effect. From a commission of all the evidence, seems of coirion that the sideration of the black, sivails & brycon Company were obtined by defendant and therefore plaintiffs were not entified to the commissions after March 18, 1341. Frior to sample 1, 1841 the evidence shows that there was the plaintiffs 1,154.08, which arount defendant concedes is due and unpaid.

Plaintiff is tooir orose-one 1 so seek that the one entitled to invert from Larch C7, 1 % 6 % ourse (, 1 % 6), the date of the entry of the deeves, by viruse at Recitor E, charlest 74, 111. Nev. State, 1645, which provides that conditions alone allowed to receive 5% or senum for all consume the construction of account from the date of livelant we come on secretia and accordainty the belone, set a curse entry of wear to parties and accordainty the belone, set a curse of wear to dited. But we think this content or set a curse of wear to dited. But we think this content or entry or execute of wear to extend the circumstance, and heart or sixtleved occurs of the circumstances, and insurvem or librate us, were witthe circumstances, and insurvem or librate as applied as, well the App. 568; acc also Papile v. Survey at the sec also Papile v. Survey at the sec. Other Map. 568; acc also Papile v. Survey at a table. App. 568; acc also Papile v. Survey at a table. App. 568; acc also Papile v. Survey at a table. App. 568; acc also Papile v. Survey at a table. App. 568; acc also Papile v. Survey at a table. App. 568; acc also Papile v. Survey at a table.

The decree of the America court of Jook county is revers o and the cause remanded with directions to enter a feores in claim-tiffs' favor and exainst detailed for il. 14.00.

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Matchett, P. J., and diemeyer, J., concur.

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REBA CAMPBELL,

Appellant,

v.

LEO R. CAMPBELL, Appellee.

APPEAL FROM CIRCUIT COURT,

520 Lite 3222

MR. JUSTICE O'CONNOR DELIVERED THE OPIN ON OF THE COURT.

June 21, 1940, a decree of divorce was entered in plaintiff's favor against defendant finding him guilty of extreme and repeated cruelty. Three children were born of the marriage, two of them were adults at the time of the trial. Plaintiff was awarded the custody of the minor child and it was decreed that defendant pay plaintiff \$140 a month in semi-monthly payments for the support of herself and the minor son. December 28, 1942, plaintiff filed her sworn petition asking that the alimony be increased to \$500 a month for her and her manor son's support and maintenance. February 16, 1943, an order was entered referring the matter to a spedial commissioner to take the testimony and report as to the earnings of defendant, etc. The commissioner filed his report December 18, 1944. March 5, 1945, an order was entered increasing the allowance to \$200 per month for plaintiff, the allowance for the support and maintenance of the monor son (he being in the Navy) was suspended until the further order of court. Plaintiff being dissatisfied with the amount of the allewance, prosecutes this appeal. The reply brief was not filed in this court until January 17, 1946.

The fecord discloses that the parties were married in 1914 and lived together as husband and wife until 1940, a period of 26 years.

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The record discloses that the position come messed in 1914 and lived together as herbard and wife wattl 1940, a person of 26 years.

The decree recites that the parties agreed in open court to a property settlement which was incorporated in the decree and the amount allowed plaintiff for the support of herself and minor child was based on the representation made by defendant in open court that his income from all sources was \$6,500 a year. In addition to the allowance of \$140 per month. defendant was ordered to pay costs and expenses incidental to the education of the minor son, including completion of high school. And it was further decreed that defendant execute a quit claim deed conveying his interest in two pieces of real estate to plaintiff; that one of the parcels of real estate on which the parties maintained their home in Winnetka, was subject to a mortgage of \$9,000 and that defendant pay this indebtedness within 10 years; that he pay taxes levied against the premises and expend \$1,000 within 60 days for repairing them; that defendant take out insurance on his life for not less than \$14,000 so that the proceeds of the policy, in case he died, should be applied to the payment of the mortgage of \$9,000 and unpaid taxes, and to assure the education of the minor child, the policy to be delivered to plaintiff and to remain in her custody until the obligations were discharged in full, at which time it was to be returned to defendant. Defendant was also required to pay some other matters.

Defendant, called as an adverse witness, testified that he remarried in 1942 and resided with this wife in Oak Park; that he was vice-president, sales manager, chief engineer and chief estimator of the Campbell-Lowrie-Lautermilch Corporation which was incorporated in 1953. The evidence further shows that defendant's income for 1942 was \$25,060; for 1943, \$25,070 and since the year 1944 had not expired at the time of the hearing, his income for 1944 does not appear.

The decree recites that the parties agreed in apen court to a property settlement which as incorporated in the and the amount allowed plaintiff for the support of he entry and minor child was based on the representation sade by defendant in open court that his income from all cources was \$6,500 a year. In addition to the allowance of MAU per monto, defendant was ordered to pay costs and expenses incidental at in to neitelemen taibulent tone remis ent to neiteeubs ent of school, And it was further decreed this cefendant excoute quit chaim deed conveying his inte set in two classes of real esters to plaintiff; that has an our council of real action on which the parties maintained their home in it evia, wee subject to a mortgare of the and bust furthern a of footdus indebt daesa within 10 years; that he her waste leviel against the premises and expend 11,000 within 30 days for repairing them: that defendant take out incurrace us ate life for not less than \$14,000 so that the proceeds of the pulley, in ease he died, should be applied to the payment of the mouthage \$9,000 and uncaid tares, and to extore the ender on of the minor child, the policy to be delivered to plaintiff and to remain in her outlody until the collegations ere discharged in full, at which time it was to be returned to defead et. Defendant was also required to pay some other mattere.

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The book value of defendant's stock in the Campbell-Lowrie-Lautermilch Corporation was \$38,372.40,

On the hearing before the court it was stipulated by the parties that from the income tax returns made by defendant and produced by him for the year 1942, defendant's salary and bonus from Campbell-Lowrie-Lautermilch was \$23,800, from which, company expenses of \$1,077.09 were deducted, leaving a net of \$21,922.91 received from the company and \$1,260 for dividends on investments, making his total income subject to tax and before deductions \$23,182.91, from which the following deductions were made: contributions, \$510; interest payment, \$258.23; taxes, \$527,86; bad debts, \$269,00; other deductions, \$1,860, of which \$1,680 was alimony; total deductions, \$3,445.09, leaving a net income, before deducting income tax, \$19,737.82. The income tax was \$6,133.67 (after exemptions of \$1,200 and \$350) leaving a net income for 1942 of \$13,604.15. It was further stipulated that for the year 1943 (following the same method as above pointed out for the year 1942) defendant's net income was \$13,702,23. All of these figures for 1942 and 1943 appear from the income tax returns made by defendant.

Defendant testified that he was living with his present wife in Oak Park; that "My living expenses per year I would say is roughly \$10,000.00 a year, for me and my wife;" that in 1943 he spent about \$1,000 for a trip to Hot Springs; \$600 to Florida and about \$200 to Minocqua, Wisconsin. The evidence further shows that since the decree of divorce was entered defendant had paid off the \$9,000 mortgage in 1942, and is thereby relieved of paying interest on the amount due; that he is relieved of paying taxes on the homestead where plaintiff resides and which taxes must now be paid by her. In this connection the evidence is to the effect that since the decree was entered in 1940, she now has to pay taxes on the Winnetka home amounting to \$216;

The book value of defendant's stock in the damphell-Lowrie-Lautermilch Comporation as 128,372.40.

On the hearing before the court it as stipulated by the TryEgen , and such appropriate the smeanth and mort daid selden and produced by him for the yer 1842, defendant's salary and bonus from Campbell-Lowrie-Leutermilch -As 18, 301, from Adres, company expenses of 1,077.69 serve decarrios, le wrige a net of \$21,967.91 received from the dompany and ... of for dividents on investments, making his total those a nubiset to the mak before decuations \$22,137.83, from which the following to believe in \*8438 (3. enable interestif fold) facolingiation : aben east taxes, \$527,58; bad debte, 260,00; other deductions, \$1,980, of which (1,690 was alimony; total default as, '6,'16.09, leaving a not income, before deducting income tar , '10, 777, 92. The income tax wes \$6,188.67 (efter exceptions of Fig. 3 to and 199) leaving a not income for 1942 of [15, 604.10. It is forther stipulated that for the year 1966 (following that the ages men as above vointed out for the year 1949) defendantly not ind the was \$13, 702, 23. All of toess figures for 1 'A? and 1945 an ent from the income ter meturns ande by esendent.

Defendant testified that he see living when it present wife in Oa! Park; that "Ly living expenses you year 1 and 19 and 18 roughly \$10,000,000 a year), for we wind my yi a; " that in 1948 he spent about \$1,000 for a trip to not arrings; '600 a ploying and about \$200 to Minosque, "isconsin. The evidence further shows that since the decree of divorce was entered defendent had paid off the \$9,000 mortgage in 1942, and is thereby relieved of paying interest on the amount due; that he is relieved of paying taxes on the homesteed where plaintiff resides and which taxes must now be paid by her. In this connection the evidence is to the effect that since the decree was entered in 1940, she now has to pay taxes on the Winnetka home amounting to \$216;

special assessment, \$19.44; insurance, \$25.60, or a total of \$251.04 per year, which leaves her \$1428.96 of the alimony allowance of \$1,680. Plaintiff testified as to her living expenses per month, aggregating \$602, but some of these items were estimates and that since the decree was entered she had borrowed from Mrs. Keller \$3,000 at different times to pay taxes and to help defray other expenses, for which she gave notes.

The chancellor in deciding the case, in referring to plaintiff said: "the Court is very much impressed with the intelligence of this lady. \*\*\* When asked about her activities, social clubs, and so forth, she very frankly told the Court what they consisted of and what she had to pay. They were small in amount, but this man [defendant] has accustomed her to a situation in life, as is apparent, below which she should not live unless he cannot afford to maintain it. \*\*\* she is not obliged to live below that standard that he has accustomed her to, and it does not mean that because a man is divorced from a woman that the woman must shift for herself and live on a standard far below that which he is capable of maintaining for her. " That both parties were graduated from the same college. "Now he is married since and he sets up in detail what it costs him to live, on an average. I think he pat it at \$10,000.00 a year." That "Necessary expense he goes to in connection with the business of the Company is a legitimate charge against the gross income of the Company, so he does not have to have those expenses, \*\*\* If it costs him and his wife, second wife, \$10,000.00 a year to live, it is hardly becoming in him to say to his first wife, to whom he owes a first obligation, the second wife is a luxury, he cannot subordinate his duty to his first wife, by placing her obligations under the present wife, that he voluntarily entered into a luxury that he took unto himself, it is hardly becoming in him to say

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special assessment, \$19.44; insurance, 125.69, or a lotal of \$251.64 per year, which leaves her flace. 95 of the althougallowance of \$1,580. Plaintiff testified as to her living expenses per month, equivalent \$5001, but some of blase treas were estimates and that since the decrees was entered the had borrowed from whe. Neller '8,000 at different times to tay taxes and to help defrag other expenses, for a lick one protest.

The chancellar in deciling a mane, in referring to plaintiff said: "The Color te very anch topoer to the 'the intelligance of this long, and when when wont new worlyitles. social clube, and so forth, and wary fauntly told the Court what they consisted of and what the new to pay, They may small in amount, but this was [defendent] has accustomed her to a situat' an in Nife, as is apparent, oslo: which sho should not live unless he cannot afford to maintain it. " she is not obliged to live below that standard tart he has ancastomed her to, and it does not an that because over is divorced evil bos tions d got fring Jama memow and Jade memor a mont on a standard far below tist wiled of is capable of maineriller for her, " That both parties were graduated from the same ollege. Wow he is married since and no sets in a cotall what it dog on which I .egarove as no povid of mid aloco if tadw \$10,000.00 a year. " That "Meressary expense he piez to in connection with the business of the Congent is a legitimate charge against the gross income of the Consenty so in desert have to mave those expenses, " " if it costs time an' his wife, second whie, \$10,000.00 s year to live, it is hardly becoming in him to say to his first wife, to how he owes a first obligation, the second wife is a luxury, he cannot subordinate his duty to his first wife, by placing her obligations under the present wife, that he voluntarily entered into a luxury that he took unto himself, it is hardly becoming in his to say

to that woman, having to maintain that home and to live even on a standard fifty per cent of what he had her accustomed to, even only fifty per cent is too much for her and that she must get along on \$1600.00 a year. Now, it just does not make sense. The parties circumstances have changed; even after all deductions for income tax."

Defendant contends that "Plaintiff is legally precluded because she is bound by her contract, " as shown by the decree of divorce. There is no merit in this contention. The court had the power and it was its duty to modify the allowance for alimony and support if the evidence showed the conditions had changed since the decree was entered. Herrick v. Herrick, 319 III, 146; Cole v. Cole, 142 III. 19; Smith v. Smith, 334 III. 370-382, Defendant further contends that the court had no jurisdiction to modify the decree on the ground that by a change in the Federal law defendant was relieved from paying any tax on the alimony he paid, but imposed the burden of doing so on plaintiff, and in support of this Russell v. Russell, 142 Fed. 2d., 753, is cited. That case is not in point. The court there held that any decrease in the divorced wife's net income because of taxes or any other reason, which brings it below what is necessary for her situation in life may be considered in granting an increase in alimony but that increase must be based on an examination of the needs of the wife in the light of the present size of the divorced husband's income but not on the theory of an equitable tax adjustment.

Upon a consideration of the entire record, which shows that defendant's income has greatly increased and the amount paid plaintiff under the terms of the decree is insufficient to meet her living expenses, we think the allowance should have been \$250 per month.

to that women, having to maintain that home and to live even on a standard fifty per cent of what he had her accustomed to, even only fifty ner cent ir too much for her and that she must get along on \$1600.70 a year. Nos, it lust toes not make some. The parties circumstances have chansed; you as a sind deductions for income tax.

Defendant contends that "Plaintiff is legilly the close because she is bound by her contract, " ar where my siz burse of divorce. There is no morit in this conserving. The court had the nower and it was its futy to medity the ellerant for Sum o militare end beache core ive out it froques bee yearlis onenged since the decree og onteres. Termich v. Harrins, 319 111, 146; (cle v. Cole, 148 111, 10; goith v. 3 470, UKL III. 370-322. Defeadant further contents tost the court ... d ... jurisdiction to moulfy the doores on the crount sect by change in the Peachal law defendant was relieved Thom reging any tax on the alleony he beld, but becomed the curren of fill. so on electiff, so le su mort of this burely v. Torell, Ics Fed. 2d., 755, is dited. That case ic not in oist. The coult there held that any locwease in the diviroed sifet; but income because of taxes or any other reason, which area is below what is necessary for her situation in U to may be considered ed taux superoni sont tiv your in a second as gaitagra at based on an examina ion of the needs of the wife in the limit of the present size of the diverged bushand's idease but not on the theory of an equitable tax adjustment.

Upon a consideration of the entire record, which shows that defendant's income has greatly increased and the Assumt paid plaintff under the terms of the decree is insufficient to seet har living expenses, we think the allowence should have been \$250 per month.

For the reasons stated, the order of the Circuit court of Cook county is reversed and the matter remanded with directions to enter an order allowing plaintiff \$250 a month beginning March 1, 1945.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and Niemeyer, J., concur.

cor the present stated, the order of the literit court ocurt of Cook county is reversed and the matter remanded ith directions to enter an order allowing plaintiff 1860 a conth beginning March 1, 1246.

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Mutchest, 2. J., and tiorayer, .., concer.

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REBECCA SPRINGER,

Appellant,

V.

YELLOW CAB COMPANY, a Corporation, Appellee.

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APPEAL FROM CIRCUIT COURT, COOK COUNTY.

320 I.A. 354

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action for negligence, on trial by jury there was a verdict for plaintiff with damages of \$300.00. Plaintiff moved for a new trial. It was denied and judgment entered on the verdict, from which she appeals. Defendant did not move for a new trial. It does not argue error in the judgment and contends only that the amount thereof is adequate under the evidence. This is the controlling question in the case.

The occurrence complained of took place March 13, 1943. Plaintiff was riding with her son and daughter-in-law in one of defendant's cabs on Kedzie Avenue near Dickens in the City of Chicago, in a south direction and at great speed, when the driver suddenly applied the brakes, vausing a violent jerk, which threw plaintiff against the sides of the cab and to its floor, injuring her. Plaintiff claims she became unconscious at the time but on that point the evidence is in conflict. She was taken to a hospital, where first aid was given. The cab driver then drove her to her home at 7033 North Glenwood Avenue, her son and daughter-in-law assisted her to the hospital and to her home.

The same evening Dr. Schechter was called. Plaintiff says she felt terrible pain down in the back and right up to the stomach. She had a headache; her mouth was bruised and bleeding. She wore a set of artificial teeth, both upper and lower plates,

43684

RESECCA SPRINGER,

Appellant,

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YELLOW CAR COMPANY, a derporation, Ameliae.

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SH. PRECIDING OUSTING COURTS OF CONTROL OF COURSE OF CONTROL

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The same evening or. Schoonter was called. Laintiff says she felt terrible pain down in the back and right up to the stomach. She had a headache; her south was bruised and blending. She wore a set of artificial teeth, both upper and lower plates,

at the time of the accident. These were cracked and broken as a result of the accident. Dr. Schechter put an ice bag on her forehead, three strips across her bare back, took her pulse, examined and gave her a sedative. He came the next day. She was continuously confined to her bed for about two weeks, and the doctor came to see her each day for about that time. She says she had terrific pains in her back and that her head ached. After two weeks she was given lamp treatments for her back by the doctor at his office. She went there twice a week for these treatments for about five months. were taken. She testified she still had a backache at the trial (May 1945) and has pain when she gets up or sits down. She had never had such troubles before the accident. The doctor advised that she get a belt for her back. She was 57 years old, had been eperated on once before for female troubles. She went to Dr. Gottleiner about her teeth. He replaced them and charged her \$125.00, which she paid.

The plaintiff's evidence is corroborated by Dr. Schechter as to her condition and her treatments with him. He says he gave her pills to quiet her pains.

Defendant argues the evidence as to damages is conflicting.

We do not find it to be so. There is no question about the bill

of Dr. Schechter nor claim that it was unreasonable. He testifies he charged \$175.00, which was the usual, customary and
reasonable charge. The dentist was not available as a witness.

He was absent in the Army. Plaintiff testified that she paid

him \$125.00 for the new set of artificial teeth. It was disclosed

artificial

on cross-examination that when she first got/xxx teeth the same

sum was paid for them, including service in pulling several
teeth she desired to be rid of. This, however, had reference

only to the first set of teeth and not the second, replaced
because of the injury plaintiff sustained in the cab. Plaintiff

at the time of the anniught, Chese were grashed and brossen es a result of the ar ident. br. indepring our saided in the men for the color of the color day. She was continuously conficed to a per for the Weeks, And the Joshor come to go here a shi dur far ilour that time. The says che wal to will be till the top to it when the that her bead and the first out of the and lives of the The type of a contribution of the colors and the tree attacks ైజు, ఇం అంటు కేర్ చారంలోని ఉంది. కో ఈ వచ్చాడని అంగాత్రి కోత్స్త్రీకారు ఈ **తల**ికారి were taker. The traditional are abit; this , in , and the true are (May 1945) and has pain when the other hand and brok 3491 year never had sunt trussine before the west that, the compre parter that the ret w belt for her were, i'll we i'l rerye y d. I at been doersted on acco before the deed a tronger . The The man house west then from the to Dr. Gottleiner asset on the theria. her Mish. OO, which shr .....

The plaintiff's crivings is samed select by m. I sheet ter as to ber condition and less tractycates with life. The ears as gave acr pills to goiet set outse.

Jefeniant argues to evidence as to divide its confliction.

To no not find it to be see. There is no error the bill of Dr. Schechter now claim that it were unrescentified. Se testifica he charged also. The setting the until, atomity and reasonable charge. The settiet as a seall, atomity and de rea absent in the tray. Thintiff testified that also paid him also. Ou for the new set of senificial testi. It was displaced on erose-granination that and the first continuation that the same artificial armination that the same first che for these, in lusing a write in paiding everal ceth the first set of the first set of the rance tests che first set of the injury plaintiff auricined in the cab. Plaintiff because of the injury plaintiff auricined in the cab. Plaintiff

and that she paid it. This evidence is not contradicted. The \$125.00 to the dentist and \$175.00 paid to the doctor made a total of \$300.00, the whole amount of damages allowed by the verdict and judgment. The court instructed the jury that if defendant was found guilty plaintiff would be entitled to have damages assessed for pain and suffering sustained as a result of the injury. It is not claimed the instruction was erroneous. It is perfectly clear the jury disregarded it. We may speculate as to the reason, but there is no evidence on which to base speculation. Plaintiff sued for \$3,000.00. The verdict was \$300.00. Plaintiff's attorney suggest there was a clerical mistake by the foreman of the jury. This is a mere guess. There is nothing in the record to support it.

The fact of negligence on the record is conceded by defendant, and that issue between these parties is settled by the judgment. Another jury should, however, be called to pass on the damages under proper instructions. Harrison v. Bingham, 350 III. 269, 273; Novitsky v. Boland, 322 III. App. 698; Parthun v. Elgin, Joliet & Eastern R. Co., 325 III. App. 408.

The judgment is reversed and the cause remanded with directions to submit the question of damages to another jury,

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and Niemeyer, JJ., concur.

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testified that the dentity observed her 'I f. ' for those, and that she paid it. This evidence is not contrad show. The size, or to the tastified and fifth our paid to the distoring out to the result of the election of the election of the election of the election and judgment. The election is contitived to larg chastif defendant was found quilt philosoff would be unitabled to be sedendant was found to have another or entitied to be sedendant was for the and autority would be injury. It is not claimed the instruction as encounted as to the perfectly clear the fixe 'I complied it. I are reason, but there is no election in the reason, but there is no election in the reason, the fixer is no election in the mound of election in the election of the election of the fixer of the election of elections is the mound of election. I have the election of elections is not the mound of election in the mound of election it.

The fact of possible of the consent by definition to restrict by the judgment, and that irror between these profiles to restrict by the judgment. Another judgment, houses, be called to one on the demages and profes instructions. Another w. haract. 350 111, 280, 277; Ovitably v. holand, and l.s. top. 12; Parthun v. Variand, and l.s. top. 12;

The judgment is revocated and the day to medical state directions to subjict the question of real gas to another inner.

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O'Connor and Miemeyer, JJ., concur.

GOLDBLATT BROS. INC., & Corporation,

Appellee,

V.

s. R. JORGENSEN,

Appellant.

A in-

LEAVE TO A PEAL FROM ORDER OF MUNICIPAL COURT OF CHICAGO GRANTING A NEW TRIAL.

320 I.A. 355

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained judgment by confession against defendant for \$387.32. Defendant was given leave to appear and defend, the judgment to stand as security. On trial before the court without a jury, judgment was entered for defendant. On motion of plaintiff, supported by affidavits, a new trial was granted. From this order, leave having been obtained, defendant appeals,

In September 1937 defendant purchased from plaintiff furniture and miscellaneous articles aggregating \$370, paying cash - \$36.39, and agreeing to pay \$25 per month until the balance was paid. He received and retained a folder bearing his name and address, showing the amount of merchandise purchased, the cash paid, the amount to be paid monthly and on which were to be noted subsequent purchased and payments. At the bottom was a notation - "Carrying Charged Omitted if Paid in Full Within 90 Bays From Date of Purchase." At the same time he signed a printed form headed WAGE ASSIGNMENT, containing several blanks. This form, before the blanks were filled in. was undated, acknowledged receipt of merchandise of (blank) value and recited an agreement of the defendant to pay a (blank) sum per (blank) period for the use and hire of the merchandise until the stated value of the merchandese had been fully paid, when it should become the property of defendant. By the form the plaintiff was also given full right "at its option at any time hereafter to treat this agreement as a contract of sale at the price above set forth. It also contained a power of attorney to confess

COLDBLART BROW. INC., & Corpora-

e. R. JOHGENERI.

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The openies of the constitution of the good feetherde interior for \$587,52. Jefesderf was liven ] are to a prot a carrier judgment to stand as security. In ord I before I will linear a jury, judament ear earleed for 'ear mount. On this tilteration, supported by affidavios, a me this are readed by affidavios. leave baving been obtained, defend on a ned ,

In Saptember 1907 defendant ovrament from Lonfoff furnitur and miccellaneous articles oggregating (670, pasing case - 286, 2), and agreeing to pay (25 new tarth until the balance and agreeing received and retained a Tolder boaring his mann and address, showing the amount of mercusadise rareigners, the cash chief, but amount to be paid monthly and on ditch were to be histed that parties as and payments. At the botton was a notation - army low charged Omitted if Faid in Wall Within 30 Days From Mise of Furchase. " At the same time he signed a printed form besief and E a lime ... containing several blanks. This form, before to blanks or e fill our in, was undated, woknowledged receipt of arrowarding of (black) value and recited an agreement of the befordant to pay a (blank) sum per (blank) perfod for the was and him of the memorandian until the stated value of the e rehandese had been fully paid, when it should become the property of defendant. By the form the end; the te coited est ta " this review of the set interest hereafter to treat this agreement as a contract of sale at the price above set forth. A lt also contained a power of attorney to confens judgment and authority to take possession of the merchandise sold on default of payments. Plaintiff filled in the blanks to show the merchandise purchased - \$363.39, carrying charges - \$20, total \$383.39, and monthly payments - \$25. The assignment was dated September 9, 1937, instead of September 11, the date on which defendant claims to have made the purchase and the date shown on the folder given him.

The defense urged on the motion to vacate the judgment was that the assignment was void because of alterations made by plaintiff after defendant had signed it, and that plaintiff had repossessed the furniture under an agreement which released and discharged defendant from his indebtedness. Plaintiff offered no evidence. Defendant testified that when he signed the wage assignment all the spaces were blank - just the printed form; that the only thing said to him was that it was customary to sign an assignment when purchasing from the store; that in May of 1938 Mr. Shay, credit man of plaintiff, in response to defendant's request that plaintiff take the furniture back and release defendant from further payment, replied, "If you will make a payment of ten dollars, I will pick it up over there, and you should hear further from me; but if you don't we will consider it closed, and we will pick up the furniture"; that Shay gave defendant a receipt, received in evidence, dated May 27, 1938, and reciting that the \$10 was to be held by Shay until defendant called upon Shay to arrange for further "dissolution" of his account with plaintiff, and that the money was not to be applied against the unpaid balance until a satisfactory arrangement was agreed upon between defendant and plaintiff.

In support of its motion to vacate the judgment, plaintiff filed the affidavit of Shay in which he stated that from November 1, 1942 to September 30, 1945 he had been a civilian employee of the U. S. Army Air Forces; that he had personal knowledge of the transactions which defendant claimed constituted a release of his obliga-

judgment and authority to sake possession of the merchan is sold on default of payments. Plaintiff fill ed in the blare to show the merchandice parchased - Jac. 74, complete chares - 250, fetal 1882.59, and make the mayments - 55. The salignment was dated hertenber U, 187, instead or believed 11, ore than on which defendent slatts to have the more are and the fater sizes and the fater filter given is.

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In samport of its motion to vacate the judges to entit! filled the officerit of thay in which he stated that from 'treater !, 1942 to september 30, 1946 he had been a civilian emcloyee of the U. S. Army Air Perces; that he had perconst knowledge of the transactions hich defendent claims documents actions hich defendent claims documents as the release of the obliga-

tiond to plaintiff, and particularly the receipt dated May 27, 1938; that at no time on that date did he assure defendant that defendant would be released from his indebtedness to plaintiff; that he never stated to defendant that "if defendant would permit certain furniture to be repossessed, that said defendant would be released and discharged from his indebtedness to plaintiff." Plaintiff also filed an affidavit of the abtorney representing it on the trial, setting up efforts to locate Shay and inability to do so until after the judgment had been entered, and that Shay could now be produced as a witness.

when defendant signed the wage assignment with the blanks unfilled and delivered it to plaintiff, there was an implied authorization to fill in the blanks in accordance with the understanding of the parties. Schnitzer v. Kramer, 268 Ill. 603; Fisk Tire Co. v. Burmeister, 252 Ill. App. 545. The insertions made by plaintiff are a substantial compliance with that authorization. Defendant's only defense was the alleged agreement of Shay to release the indebtedness, and the burden of establishing that defense rested upon defendant. The affidavit of Shay is a direct contradiction of defendant's testimony and is supported by the receipt signed by Shay. Plaintiff was not negligent in failing to produce Shay on the trial, and the granting of plaintiff's motion for a new trial rested in the discretion of the trial court and that discretion was not abused.

The order appealed from is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

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tions to plaintiff, and particularly the veres to dated as 17, 1 38; that st no time on thet date did he as ure defendent; and he solved would be released from his indirected to defendent; that he never stated to defendent that "if cofree it would are it read from his time rid defendent sould os enlessed furniture to be recommend that rid defendent sould os enlessed and discharged from his indirect to a the release to the state of the sales from the artifect of the attraction of the artifect to a care and a second ing it a read this, setting up efforte to 3 care and and it of live the range until after the judgments had been ended only and the recent of the produced as a witness.

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Matchett, F. J., and O'Con or, .. renour.

SAMUEL GERTZ, FLORENCE GROSSMAN and THEODORE J. HORWITZ, co-partners doing business as JUNIOR TOWERS,

Appellees,

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LOUIS G. NEIMAN,

Appellant.

1 Descriptions

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

32. I.A. 356

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

August 8, 1945 plaintiffs obtained judgment for possession of Apartment No. 8 on the 10th floor of the building at 707 Junior Terrane, together with a stall in the garage in the rear, the writ of restitution being stayed to November 1, 1945. October 31, 1945 defendant filed a petition to vacate the judgment. Plaintiffs answered, and on November 7, 1945 evidence was heard, defendant's motion for leave to file an amendment to his petition was denied and his motion to vacate the judgment overruled. From these orders he appeals.

plan to immediately alter and substantially remodel the building in which the apartment was located. Defendant's motion to vacate is based on the claim that plaintiffs have changed and modified their plans so that they do not contemplate immediately remodeling or altering the building above the 6th floor, and because of that fact it will not be necessary for plaintiffs to have possession of the apartment occupied by defendant. Plaintiffs' answer states that since the entry of the judgment for repossession, remodeling of the first six floors has progressed to a substantial extent; that at the trial it was shown that plaintiffs intended to remodel the building in two stages - the garage and first six floors immediately, and the remainder of the building when convenient; that all of the tenants of the building

SAMUEL GERTZ, FLORENTE GROSCHAM

and THEODORE J. HORWITZ, ocpartners doing business as
JUNIOR TOWERS,
APPEAL FROM JUNICIPAL

V.
LOUIS G. WEIMAN,
Appellant.

MA. JUSTICE MIESEMENT DESIRESED TO SIN ON OF THE CO ..

August 8, 1945 plaintiffs orthind jungment for possession of abantment No. 8 on the 1 th floor of the building at 797 Junior Perrage, together with a stell in the garune in the rear, the writ of restit tion being stayed to Novemer 1, 1945. October 31, 1945 defendant filed a petition to varate the judgment. Fluintiffs answered, and on November 7, 1945 evidence was heard, defendant's motion for leave to file an amendment to his petition was denied and his motion to vacate the judgment overraled. From these orders he meals.

Plaintiffs' action for pos ession was a sed on their plan to immediately alter and substantially r model the building in which the apartment was located. Defendant's motion to vacate is based on the claim that plaintiffs have changed and modified their plans so that they do not contemplate irrediately remodelting or altering the building above the 6th floor, and because of that fact it will not be necessary for plaintiffs to have possession of the spartment conspisal by defendant. Plaintiffs' answer states that since the entry of the judgment for repossession, remodeling of the first eir floors has progressed tose substantial extent; that at the trial it was shown that plaintiffs intended to remodel the building in two stages - the garage and first six floors immediately, and the remainder of the building when convenient; that all of the tenants of the building when convenient; that all of the tenants of the building when convenient; that all of the tenants of the building

including defendant, had been given an opportunity to lease one of the remodeled apartments but defendant instated upon keeping the apartment on the 10th floor. The answer also asserted need of defendant's apartment during the remodeling to accommodate a tenant ac epting a lease of a remodeled apartment, and urged want of jurisdiction to vacate the judgment because of the lapse of more than 30 days after the entry of the judgment.

After hearing evidence tending to support plaintiffs' answer the court denied defendant's petition for want of jurisdiction. After the court had stated his position as to the vacation of the judgment, defendant asked leave to amend his petition to ask for the further stay of the writ of restitution. The court denied this motion. We find no error in its rulings. The application to vacate the judgment was filed too late. (Sec. 21, Municipal Court Act, Ill. Rev. Stat. 1945, chap. 37, par. 376.) If we concede (which we do not) the right of the trial court to stay the writ of restitution indefinitely, as contended by the defendant, the granting of stays would be a matter resting inbthe discretion of the court, and the record does not show abuse of discretion unfavorable to defendant.

The orders appealed from are affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

including defendant, had been liven an constraint to learn one of the newodeled drantmenth but different to live the loop, where upon keeping the enauthment on the lith floor, it a shawer also ascerted need of defendant's apartment diring the remodeling to accommodate a tender so eptimals large of a remodeled apartment, and urgen want of just it that to because of the judgment because of the large of none than 30 large of the judgment.

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The orders accelled "rom are affirmed.

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Matchett, F. J., and b'Comer, J., conver.

EBERHART PLAZA, INC., Appellant,

V.

ELVIRA HAYES,

Appellee,

APPEAL FROM THE MUNICIPAL GOURT OF CHICAGO.

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MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 7, 1945, plaintiff brought an action of forcible detainer against defendant to recover possession of the first apartment of a building known as 449 East 62nd Street. Chicago. The summons was returned "not found". An alias summons was issued and served on defendant. On the 23rd of August the following judgment in defendant's favor was entered: "It is ordered by the Court that this suit be and it hereby is dismissed out of this Court." Afterward plaintiff gave notice to defendant that on the 4th of September it was going to ask leave to file a petition and for an order reinstating the case which it accordingly did. The petition set up that the rent for the apartment which defendant was occupying was \$47 a month; that it had not been paid for the month of July and no payment had been made since that time; that the cause was heard on August 23, at which time defendant was present and acknowledged to the court that she owed the rent mentioned in the five day notice. That thereupon the court ordered defendant to pay the rent to plaintiff within one hour, to which defendant agreed and thereupon the court, on its own motion, dismissed the case. That the rent had not been paid and the prayer was that the judgment be vacated and the cause reinstated. September 4, the matter came on for hearing before another judge; defendant did not appear. Plaintiff's motion to vacate the judgment of

EBURHART FLAZA, ING., Appellant,

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SLVIRA EAYES,

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MR. JUST 1638 NOR SELEVICE FOR SUCH I STORE TO SUCH

august 7, 1645, plaintiff orceout an action on formitle detainer segingt defendant to recove . Dossessing of the riret anartment of a building trown of 400 Mart 62nd Street. Abtrauc. The summans we returned "not found". In miles surrons was issued and served on defendant. On the 25m of August the following judgment in defendant's favor was covered: "It is ordered by the Good ther while suit be and it hereby is disminered out of this Court. Afterward plaintiff gave a tice to defendent that on the 4th of laprechar it wer woine to ser leave to file a retition and for we order reinstation the mase which it accordingly did. The netition set in that the reat for the apartment which pare prort se corrected and "AV a mid h: that it had not been gaid for the world of Tay and a negrotor no brine was sever oil tend (and ponis shan need bad August 83, at which time estable our conservation and ach collected to the court that she owed the car wentioned in the five day notice. That thereupon the court ordered defendent to pay the rent to plaintiff within one hour, to which defendant ngrete and thereupon the court, on its own motion, dismissed the case. That the rent had not been paid and the crayer was that the judgment be vacated and the course reinstated. September 4, the matter came on for hearing before another judge; defendant did not appear. Plaintiff's motion to vacate the judgment of

August 23 and to reinstate the cause was allowed. The case was then heard. The court found defendant guilty of wrongfully withholding possession of the premises in question and ordered that the writ of restitution be stayed 5 days. September 13. pursuant to notice, the parties appeared before a third judge and an order was entered continuing the matter until the next day at which time the court ordered that the judgment of September 4, 1945, be vacated. The judgment order further recites that the matter came on for hearing without a jury; that vthe court heard the evidence and found defendant not guilty. From this judgment plaintiff prosecutes this appeal, and September 19. filed its notice of appeal and its verified petition which purports to set up the facts in the case, from which it appears that the rent was not paid within the hour after the judgment of dismissal was entered August 23; that it was tendered for the three months then due on the 11th of September but that plaintiff refused to accept the money.

There was no warrant in law for entering the judgment of August 23, dismissing the suit, and this judgment was properly set aside on September 4, when he heard the evidence and found for plaintiff. Judgment was entered on the finding, and on September 14, the court was without authority in again hearing the case and finding defendant not guilty, for the sole reason that she had tendered the rent on September 11 and again on the 14. At that stage of the proceeding plaintiff was not obliged to receive the rent.

The judgment of the Municipal court of Chicago appealed from is reversed and the cause remanded with directions to reinstate the judgment of September 4, 1945.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and Niemeyer, J., concur.

August 25 and to reinstars the couse ass (Lipse. " is a se no then heard. The court found referred rullty of rotafelly withholding posseston of the premise of ansatases gmibloddit that the writ of restitution be stayed if aye. To become it Durguant to no ice, the Darkies notes ed tologs a tite je ... and an order was fitted on them are parentally devotes you rebut as has at thick ind the court of the their termina and ent ani: dolle te 4, 1946, be vacated. The judgency order the ore edited or the matter same on top hourded district of only anatorics court heard the evidence and "sund struct ben considere out brack jag er eggend mis , Lamie thit reservent Phitnisia dinarghuj filed its notice of appeal in its whitten restring raise. gurports to eet in the fact and the second former and the of strongung the thing of the contract states black for any tage and teat ing disease was been been been been distincted to be the same as a second of the contract of t ୁ (୧୯) ବିଜୁଲ ବିଜୁଲ ବହୁର ପ୍ୟସ୍ତ ୧୯୭୯ରୀ ବିଜ୍ୟ ହଣ୍ଡ ବର୍ଷ ପ୍ରତ ବହାରି **ସହାନ୍ତ ଅଧିକ୍ରର ବହାୟ**ଣି refueed to as out base samey.

There wee no twitted in level of antending the leight of antending the leight of August 23, discissing the soit, and this take and and set aside on 'aptender 6, then we need the evidence and four for plaintiff. Judgment to advaned on the finding, and the September 14, the equal to as with at twitter in equal bearing the case and finding defendant not said to, for the alle reason that she had tendence the trent on the bearing the example the left of the tent or boliged to receive the rent.

The judgmant of the unicipal court of indexpo a realed from is reversed and the cause remanded with circothous to relactate the judgment of deptember 4, 1945.

REVERSED AND SUMMERS. ILE DIRECTIONS.

Matchett, P. J., and Miesey J., concur.

43649 ) Consolidated.

A. E. CARPENTER, Trustee, Appellee,

V.

SAMUEL DICK PRYCE and ELIZABETH DREW PRYCE, Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

321 IA. 3

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 6, 1945, A. E. Carpenter, as trustee under the last will and testament of Edward R. Hall, deceased, filed his complaint in chancery to foreclose the lien of a trust deed given on premises in Evanston, to secure an indebtedness of \$30,000 evidenced by a promissory note. After the issues were made up the cause was referred to a master in chancery who took the evidence, made up his report and recommended that a decree of foreclosure be entered as prayed for, Objections which afterward stood as exceptions were overruled and on October 1, 1945, a decree of foreclosure and sale in the usual form was entered. October 25, 1945, defendants filed a notice of appeal and a motion that the sale be stayed pending an appeal to this court. The motion was denied and on the next day an order was entered approving defendants' appeal bond. The bond is not in the record but on the oral argument it was admitted that the bond was a cost bond for \$250. Afterward the property was sold by the master to plaintiff for \$22,500. November 1, 1945, the master's report of sale and distribution was approved and a deficiency decree for \$15,381.72 was entered against defendants. November 17 they filed notice of appeal from the decree of November 1, 1945.

The record discloses that June 23, 1928, Wayland L.

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45649 ) Consolidated.

A. S. CARPENTA, Trustee,

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SAMPEL DICK PRYCE AND ELIZABETH DREW PRICE,

Appellante.

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MR. JUSTICS O'CONNOR DELLVERED THE HELLY OF THE SOURS.

April 6, 1945, 2, 9, Carpenter, se unger under he last will and testament of dward 8. F.l., deceased, filled his complaint in chancery to foreclose the lism of a truct deed given on pregises in Tyanston, to recure an indebtedness of \$50,000 evidences by a promiseory note. After the leques were made up the cause was referred to a maken in chancery was took the evidence, and up his report and recommended that a decree of foreclosure be entered as preyed for Chiecklour which afterward stood as exceptions are overvuled and on Cotober 1, 1845, a decree of foresteame and sele in the nearl form van entersd. October big 3 db, defendante filed a notice of ampeal and a motion that the sale be stayed pending an appeal to this court. The motion was denied end on the next day an order age entered approving defendants appeal bond. The bond is not in the record but on the ord and the was admitted that the bond was a cost bond dor '750. Afterward the roperty was sold by the mester to plaintiff for \$82,500. Movember 1, 1945, the master's report of sels and distribution was approved and a deficiency decree for \$15,581.72 was entered against defendants. Movember 17 they filed notice of appeal from the decree of November 1, 1945.

The record discloses that June 23, 1928, Wayland L.

Cocreft and Elsie Cocreft, his wife, executed their prommissory note payable to bearer for \$30,000 due five years after date with interest at 5 1/2 per cent per annum and to secure the payment, on the same day executed their trust deed conveying the premises in question to the Chicago Title & Trust Company, Trustee. The premises were improved by a 2 and one-half story and basement frame residence located in Evanston. The property was originally owned by Edward R. Hall who sold it to the Cocrefts who took in part payment the note and trust deed. Some 6 months afterward the Cocrofts sold the property to defendants, Samuel Dick Pryce and Elizabeth Drew Pryce, his wife, for \$26,500 cash and theyaassumed the \$30,000 mortgage. When the indebtedness came due June 23, 1933, Edward R. Hall. by his son, Edward B. Hall, and defendants, executed a written agreement extending the time of payment for a period of 5 years or until June 23, 1938. And on June 23, 1939, the same parties executed another agreement extending the time of payment of the \$30,000 for a period of 5 years or until June 23, 1943. That extension agreement further provided that if the Pryces should pay \$5,000 on account of the principal on or before June 23, 1939, the indebtedness evidenced by the note for \$30,000 would be reduced to \$20,000 and the rate of interest to 4 1/2 per cent upon the \$20,000. By the terms of the extension agreements all of the provisions of the trust deed except as therein changed, should continue in force and effect, No part of the \$5,000 mentioned was paid. May 3, 1941, the son, Edward B. Hall, wrote defendant, Samuel Pryce saying: "When the note which I hold for mmy father's account, secured by mortgage on your residence at the above address, [1735 Chicago Avenue, Evanston, Illinois comes due in June, 1943, I hereby agree, if you request it, to renew the loan for another period of five years on the same terms, " The father, Edward R. Hall, the owner of the note and trust deed died testate shortly

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Cocrost and Elsie coords, big vise, executed their programmy note payable to bearer for 250,000 due five gears after aste with interest at 5 1/2 per cent per a number of the secure the premines in question to the duitego "ite e rost coronny Tructee. The prewises were imported by a dead on small stars and becement frume residence has sed in brune one. The mary ent of if her out Elen . H. Landa W below Wiferighto saw Coercits who took to wart measure the sole and a troop ode strongood Some 6 months externant has document sold is your to his defendants, Samuel blow foor and blickers when to be, in -wife, for 286,500 came and they are maded tha 140, at most -by his son, Comerd L. nell, and defendants, out, fear a will ten agreement extending the time of cognect for corned of conor until June 35, 1336, 105, 105 on duar 84, 1 35, the way a antenetal executed another agreement attending the sire of system of time NSO, OCC for a pertied of C FRANG or walling the No. 194 . That extension aspectest funtary provided to third grayer should pay \$5, (0 on a count of the select at on or inter-June 23, 1934, the indestronest evidence by the cuto for \$30,000 would be reduced to UFF, DEE the mile of intermet to the series and the 180,000. By the series of the extension agreements at the promotions of the true of the except as therein changed, should continue in force and effect, No part of the 15,000 mentioned was paid. Ay 3, 1 41, the son, Edward B. Hall, wrote defendent, teruel bryce setination "When the note which I hold for any father's a count, recured by mortgage on your regidence at the above affress, (1735 Ohicago Avenue, Evanston, Illinoish comes due in June, 1875, I terreby agrae, if you request it, to renew the loan for another peried of five years on the same terms." The father, Edward IL, Hall, the owner of the note and trust deed died testate shortly

before June, 1943 and plaintiff, A. E. Carpenter, was appointed executor and trustee under the will and apparently, after the estate was closed in Florida, plaintiff held the note as trustee and afterward filed this suit. No part of the principal has been paid and the interest was paid to June 23, 1943 but no payment of interest was made thereafter.

Defendants contend that the indebtedness did not become due June 23, 1943 for the reason that they were entitled to have the time of payment extended, in a cordance with the letter of May 3, 1941, as above quoted.

The evidence further shows that after Mr. Hall, Sr's death, defendants called on his son, were advised of that fact and they then took the matter up with Mr. Carpenter, the plaintiff.

Counsel for plaintiff say that it was admitted on the hearing before the master, and is admitted here, that any agreement made by Mr. Hall, Jr., would be binding on his father's estate but they point out that under the evidence, the defendants did not seek to have the time of payment extended either by Mr. Hall, Jr., or plaintiff, Mr. Carpenter. June 15, 1943, defendant, Mr. Pryce, wrote Mr. Carpenter at Orlando, Florida, stating that he usually had dealt with Mr. Ed. Hall regarding the Evanston matter and had called on him but found he was no longer representing the father, who had died. The letter continued: "As you know the property is now valued at \$17,000.00 or thereabouts. The bank has offered to take over the loan at approximately \$10,000.00. I presume you would like to settle the estate. I should like very much to settle the mortgage for about \$10,000.00. If you are willing to carry the mortgage at \$10,000.00, I will pay 6% the first year, 5% the second and 4 1/2% thereafter for the term of the mortgage. I trust that this will meet with your approval and shall be glad to hear from you." Two days afterward, June 17, 1943, Carpenter replied acknowledging receipt of the letter and stating that

before June, 145 and laintiff, a. T. Orrest r. was appointed executor and trustee under the fill and apparently, after the estate was closed in Thride, plaintiff held the note as trustee and afterward filed this suit. No mark of the principal has been paid and the inverset as paid to the 25, 1943 but no payment of interest was ands thereafter.

Defendants content that the indebt dues: did not become due June 25, 1945 for the resent that they some entitled to have the time of payment extended, in a second citic the latter of hay 5, 1941, as above crotes.

The evidence further case elast error of east, or a death, defendants called at the contact of the fact and they then took the autor or as site, and they then took the autor and they then took the sait of the case of the plaintif.

Councel for plaintiff off is it in contract on the denoting before the mapine, in it is the perturbed are, that my appropri ment make by m. Ball, it., a) if we bind by o lin fatharia Autate but ther point out this or or the ratione, the defendants did not even to mave the class of eaglest extended either by Mr. Hall, Jr., or obsintiff, m. Jersen m. Open 18, 114., defendant, Mr. Pryce, wrone . Competer at Col. clo. Corida, stating that he usually and dealt ith in. ". wall promendin the Byangton marter and last led on the tit for he car no longer representing the father, who had died. The lefter continued: "As you know the property is no welued at 17,000.00 or thereabouts. The bank has of fores to take over a ellowe at approximately 610,000,00. I promuse ou would like to settle the estate. I should like your much to settle the mortyses for about \$10,000.00. If you are willian to care the mortifage at 10,000.00, I will pay 67 the first year, 3" the recond and 4 1/2% thereafter for the term of the mortgage. I trust of balg od Ilada bas lavorors quer dita feem lite at t tent hear from you." Two days afterward, June 17, 1945, Carpenter replied acknowledging receipt of the letter and stating that

the mortgage was one of the assets belonging to the estate of Edward R. Hall, deceased, of which he was acting as executor; that the mortgage was left in trust with directions as to disposition of the money: when paid; that "I am not particularly interested in a reduction of the principal amount. It is my duty to make the fund produce as much income as possible and at the same time preserve the fund so far as possible for the future owners. \*\*\*

"If your offer is to pay \$10,000.00 and wipe out the mortgage,
I think that I can say at present that the offer is rejected."
Afterward, July 28, 1943, Mr. Pryce again wrote plaintiff
acknowledging the letter of June 17, stating that he had recently
solicited several parties as to the value of the property and that:

"The concensus of opinion seems to be that the place will not bring more than \$15,000 if sold at forced sale. I should be glad to have you verify this figure and if you find it correct will suggest the following proposition.

"The present mortgage to be reduced to \$15,000, the full valuation of the property. Said mortgage to run for at least five years with the privilege of renewal for a second five years, and bear interest at the rate of four and one-half per cent payable semi-annually; we to have the privilege of making pre-payments of \$500 or multiples thereof on any interest day by giving written notice sixty days in advance.

"We believe this is the maximum that can be realized from this property and feel that we should receive consideration ahead of any possible buyer at the same figure."

Plaintiff did not reply to this letter until May 15, 1944, when he refers to defendants' letter of June 15, 1943, above quoted, and says: "The \$10,000 which you offered was not at all satisfactory, and at this time I will be pleased to receive some further word from you as to your position, and in the meantime I am discussing the matter with those primarily interested."

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the mortgage was one of the heads belongine to the estate of Edward R. Hall, deceased, of which he action as executor; that the mortgage was left is thust with directions as to disposition of the money; when whi; that "I want of particularly interested in a reduction of the oriental amount. It is my duty to make the fund produce an such income action of the same time processes the fund and an fer an openible for the future owners."

"If your offer is to pay 710, 30.00 and wise out the montgard, I think that I oan say, at heseen that the offers,"
Afterward, July 28, 1012, and myone a will state plaintien acknowledging the leter of Jane 17, tating the termently collected neveral paymes as to the value of the serves payments, and

Fine conceasus of saidles seems to se then the class will not bring more than "la, C of it cold at former sole. I should be glad to have you wentry this firmer and if you list it correct will suggest the following proposition.

The present mortgue to be reduced to M1, No, the full valuation of the drop mty. Said sort age to run fin at least five years with the privilers of rans at for a second five years, and bear interest at the rate of four and one-half my cent payable cart-annually; so to have the privilers of maring ore-payments of \$500 or multiples thereof on any interest day or syling written notice sirty days in advance.

"We believe this the assignation be reall ad from this property and feel that a should reasily consideration whead of any possible buyer at the same flaure."

Plaintiff did not reply to this letter until key 15, 1946, when he refers to defendants' letter of June 18, 1948, above quoted, and says: "The \$10,000 which you offered was not at all satisfactory, and at this time I will be pleased to receive some further word from you as to your position, and in the meantime I am discussing the marrer with those primarily interested."

There was further correspondence but no agreement was reached and this foreclosure suit was brought.

The master and the chancellor each found there was no valid agreement between the parties to extend the time of payment beyond June 23, 1943. But we think the evidence shows that defendants did not ask that they be given a further extension but submitted a new proposition which was rejected.

Upon a consideration of all the evidence in the record, we are clearly of opinion that the finding is in accordance with the evidence. The decree of the Circuit court of Gook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and Niemeyer, J., concur.

There was further correspondence but no agreement was reached and this forcelosure suit was brought.

The master and the observation each found there was no valid agreement between the parties to extend the time of payment beyond June 27, 1945. But we with the teace shows that defendants did not ank that they we wiren a furtion extension but submitted a new records the extension but submitted a new records the mainh was rejected.

Property of specification of all the entirease to the court we are clearly of splated the finding is in anomal the with the cyldenie. The despite of the interpolation of the county is affirmed.

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Abstract

## STATE OF ILLINOIS

## APPELIATE COURT

FEBRUARY TERM, A. D. 1946

Gen. No. 9476

Finis E. Downing, Complainant,

VS.

William B. Finn, et al., Defendants.

William B. Finn, Cross Complainantand Appellee,

VS.

Centennial National Bank, Cross Defendantand Appellant.

Gentennial National Bank, Plaintiff-Appellant

VS.

William B. Finn, )
Defendant-Appellee.)

Wheat, J.

Agenda No. 1

217)

Appeal from
Sangamon County
Circuit Court.

329 I.A. 397

This is an appeal from a decree of the Circuit Court of Sangamon County ordering appellant, Centennial National Bank, to pay appellee, William B. Finn, the sum of \$10,270.67, with interest, as a result of an accounting relating to transactions involving certain real estate known as the Opera House in Virginia, Illinois. This accounting was ordered by a prior decree of said Court, which decree was substantially affirmed by this Court on appeal. (Downing v. Finn, 308 Ill. App. 366.) As the opinion in such case is printed in abstract form, a brief history of the entire transaction and litigation is herein-

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after set forth for the purpose of making the issues in the current appeal more understandable. Such condensation is difficult as the report of proceedings comprises over nineteen hundred pages.

In 1915 and 1916, a foreclosure proceeding was had in the Circuit Court of Cass County involving the Opera House property against which the bank held a junior mortgage. A certificate of sale was issued in the name of Henry Jacobs who later assigned the same to Finn. As to most of the subsequent proceedings, one dominant issue was as to whether Finn dealt directly with Jacobs or was fraudulently induced to make the deal by the cashier of the bank. A Master's deed was issued to Finn in 1917, by virtue of the certificate so purchased by him, and he went into possession. In 1926, the mortgagor, Downing, was successful in a suit to redeem the property because of defective foreclosure proceedings involving the subject of fraud on the part of the bank. In such suit, an accounting was had by the Court between Downing and Finn. While this suit was pending, on August 31, 1933, Finn filed a cross-bill against the bank, charging that the latter was the real party in interest as defendant in the Downing suit, charging fraud by the bank in his purchase of the Jacob's certificate of sale, and asking for an accounting between himself and the bank. He was successful in this action and the decree granting him relief, entered May 19, 1939, was, in substance, affirmed by this Court as above stated. Thereafter, the Circuit Court referred the matter of accounting to a special Master in Chancery, whose report of findings was approved by the

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Circuit Court and embodied in its decree of December 16, 1944, which, as aforesaid, ordered the bank to pay to Finn the sum of \$10,270.67, and interest. This decree also dismissed a complaint, in the nature of a bill of review, filed by the bank against Finn, during the pendency of the accounting suit, which complaint prayed for vacation of the decree of May 19, 1939, on the ground of fraud, and for judgment against Finn. It is from this decree of December 16, 1944, ordering the payment under the accounting and dismissing the complaint in the nature of a bill of review that this appeal has been taken.

The action of the Court in dismissing the complaint in the nature of a bill of review will first be considered. The complaint charges that Finn committed a fraud upon the Circuit Court and this Court by his testimony in the earlier proceeding, upon which the decree of May 19, 1939, was based. In substance, this testimony was, according to the complaint, that in the earlier proceeding, Finn falsely testified that he purchased the certificate of sale from the bank, and not from Jacobs, for the sum of \$9,000.00, and that he purchased the picture show outfit from Jacobs for \$450.00, which was a different and separate transaction. The complaint alleges that in connection with the subsequent testimony of Finn on March 27, 1942, he produced a memorandum as follows:

\* Nemorandum of Agreement between Henry
Jacobs and W. B. Finn: Sale of Certificate of
Sale Tureman Opera house and picture show outfit.
Contract to be drawn on terms agreed on, by Chas.
A. Gridley. Total consideration \$9,450.00.

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Express \$2.00 Paper 65% Piano player \$2.00 Lights \$1.00 Misc \$1.85 Total \$20.00 Lease to be assigned. Cash paid \$450.00

Henry Jacobs

He testified that this was written by Henry Jacobs, signed at the latter's home, March 10, 1917, in the presence of Mrs. Jacobs and her daughter.

A careful examination of the pleadings in the earlier proceedings indicates that the issue was not whether Jacobs was the owner of the certificate of purchase, as this was admitted, but whether the bank had induced Finn to make the deal regardless of the ownership of the certificate, and whether the bank promised to protect Finn and to see that he obtained good title. The evidence as to such issues indicates that it was recognized by both sides that Jacobs had the legal title to the certificate of sale, but there is no evidence that he ever tried to pursuade Finn to buy it. The real issue was as to whether the bank fraudulently induced Finn to become a purchaser of the said real estate and whether Finn suffered loss thereby. The certificate of sale was issued to Jacobs, March 20, 1916; Finn's testimony was that his negotiations with the bank began in January, 1917, and continued until the deal was completed in March of that year; his testimony was considered as credible by the prior findings of the Master, the Trial Judge, and this Court in the former appeal. execution of the memorandum in question, March 10, 1917, was

not contradictory of Finn's prior testimony but is consistent therewith, being but one incident of many necessary to the consummation of the transaction. The evidence justifies the decree of May 19, 1939, and the prior affirmance by this Court of such decree. It does not appear that if such memorandum had been produced in the earlier proceeding it would have been of such an important and decisive character as would have produced a different result nor would a different conclusion have been drawn from the entire evidence. The Court was not in error in dismissing this complaint for want of equity.

As to the accounting, consideration will next be given to the matter of the profit on the transaction relating to the Virginia Building and Savings Association stock. 1917, upon receiving a deed for the property, Finn executed a note of \$6,000.00, secured by a mortgage on the Opera House, to the Virginia Building and Savings Association and subscribed to a like amount of its stock. In the following 120 months, through monthly payments, the stock matured to a value of \$6,000.00, which was paid to Finn instead of being applied toward the cancellation of the mortgage. The decree permitted Finn to have a credit in the accounting for a sum of \$581.34, which represented earnings or dividends over and above the fixed rate of interest then being paid by the association, which sum the bank claims should be credited to it. Although the decree of May 19, 1939, ordering the accounting, provided that the bank was to account to Finn "for all losses " " " sustained or suffered on account of the supposed purchase of said real estate, including all money and obligations paid the said

with a company of the TO BENEVE A THE STATE OF THE ST Company of the control of the contro entropies in the stream of the ners and the second of the sec ্রান্ত্র প্রত্তি । সামানুহক তিরুদ্ধি হিল্পান্ত । প্রভারত রিলা W 1 - 1 - 12 - 1 - 2 - 2 - 1 - 10 30 - 10 m Commence of the second and the property of the same o The second of th The second of the control of the second of t to the season of the season The second second second second the second was well as it authorities of the second of the second the second of th Fig. 1 and the control of the contro The state of the s Die. Wei to prefere hart car in the decine Eggs with to The out live to it was to be grown the period and place

Centennial National Bank or said Virginia Building and Savings Association", we believe that the stock transaction was so inseparably interwoven in the entire subject matter as to require a construction of the decree directing Finn to account for his profit, as well as his loss, in the transaction.

The remaining disputed matter relates to the rental value of the Opera House. The bank contends that such value was fixed in the original accounting suit brought by Downing at the sum of \$600.00 per year, unheated, under and by which computation instead of the bank owing Finn any amount, the latter would be indebted to the bank in the sum of \$2,367.57, or, if the aforesaid stock profit were included, in the sum of \$2,948.91. In the instant case, the rental value was fixed at \$500.00 per year, with credit for the cost of heating. bank charges that the matter is res adjudicata because Finn was an active defendant in such suit and because the issue was the same as in the later and accounting suit between Finn and the bank. The general rule seems to be that as between co-defendants, the judgment adjudicates nothing which might have been, but which was not in fact, put in issue between them, but if an adjudication of issues is made between co-parties, it is res adjudicata in subsequent litigation between them, even though their separate answers did not purport to raise such issues as to each other. In so far as their rights and obligations are dependent upon their rights or obligations toward their common adversary, the judgment adjudicating the latter is conclusive upon co-defendants in subsequent litigation between them.

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(I Freeman on Judgments, 5th Ed. Sec. 425). It is also the general rule that the only parties concluded by a decree are adversary parties and the matter determined must be in issue between them, either by pleadings or in fact. If no issue between co-defendants in a chancery suit is presented and adjudicated, the decree is not evidence in favor of either party against the other. (Renfro v. Hanon, 297 Ill. 353).

It must be kept in mind that the issue in the original suit of Downing related to the right to redeem and that the matter of rental value was incidental; that the decree in that suit, which was not appealed from, specifically stated that the foreclosure proceedings, in so far as the bank was concerned, constituted a fraud upon the Court by reason of which, the decree of foreclosure was set aside. Subsequently, Finn obtained leave to file a cross-bill based upon the fact that he was only a nominal defendant in this suit; that the real defendant was the bank; that the attorneys appearing were those retained and paid by the bank and that he relied upon the promises of the bank to protect his interests. He also pointed out that he was charged with an item of \$8,853.65 for money which the bank received and kept, which error is admitted by the bank. In other words, Finn's position was, and is, that the bank was the real defendant, that there was no privity in interest and that he was merely co-operating with such bank in reliance upon its promise of protection. In permitting the filing of the cross-bill by Finn against the bank, the Trial Court presumably concluded that they were not adversaries in the Downing suit. The Circuit Court, in its decree of May 19, 1939, likewise found that the said bank "not only promised to protect William B. Finn and see that he

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got a good title but apparently considered the Downing suit its own law suit and protected William B. Finn at its own expense by defending the same until the final determination thereof. " This Court, on appeal, likewise stated, "Under the terms of said decree, it was adjudicated that the foreclosure proceedings and sale thereunder, including the certificate of purchase, were void; that a fraud had been committed in obtaining certificate of the order of sale, the foreclosure and the issuance of the /purchase in question, and that said certificate was absolutely void and worthless from the time of its execution. It is a fair deduction that the lawyers who obtained the decree of foreclosure, the order of sale, and the issuance of them certificates perpetrated this fraud for and in behalf of the bank, with notice and knowledge to the bank's agents and attorneys. Therefore the bank is chargeable with the same \* \* \* the obtaining of the foreclosure in the first instance, and the issuance of the certificate of purchase were a fraud upon the Court, in which the bank, through its agents, had participated. The selling of the certificate, which was a spurious instrument, by McDonald to Finn, amounted to fraud and deceit, for which the bank was responsible. " (Downing v. Finn, supra).

In view of this state of the record relating to the repeated determination by several special Masters in Chancery, the Trial Court, and this Court, no conclusion can be drawn but that the bank committed a fraud upon Finn; that at the earlier hearing, in which Downing was the plaintiff, the said Finn was not adequately represented; that no issue was made as between his theory of the case and that of the bank and that the

. . . SEEL S -,  sole interest of the bank in such case was to obtain the best settlement possible with Downing, ignoring the interests of Finn in such proceeding; and that Finn had no adequate opportunity of cross examination of witnesses. Under these circumstances, it cannot be said that the interests of Finn and the bank were identical in the accounting between Downing and the real defendant, the bank. The defense of res adjudicata is not applicable.

It is further contended that Finn should be denied relief by reason of laches; that he adopted the original Master's findings as to rental value by making them a part of his cross-complaint, claiming only one-half of the heating expense and delaying his change of position, claiming credit for all heating expenses, for eight years, at which time certain witnesses had died.

A reading of the cross-complaint filed by Finn,
August 31, 1933, discloses that the gist of his action was
the wrongful acts, misrepresentations and fraud committed by
the bank to his damage in the sum of \$60,000.00. His principal
prayer for relief, then, was that an accounting be ordered,
and the attaching to his cross-complaint, as an exhibit, the
Master's report in the suit brought by Downing, was for the
apparent purpose of pointing out the inequitable position he
was then in. He did not know that he was to get the desired
relief until the opinion of this Court was filed, October 15,
1940, and re-hearing was denied, February 5, 1941. Pursuant
to the order of this Court, the Circuit Court, on September 8,
1941, entered its modification decree. On December 8, 1941,

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he filed his motion to amend his cross-complaint, by claiming credit for all heating expenses. We cannot say that the Trial Court erred in allowing this amendment, or in its decree approving the findings of the Master thereunder. The subject of the amendment did not constitute a new cause of action and was germane to the original relief sought.

It is urged that the Master and the Court should have considered as competent evidence the former testimony in the Downing suit of three witnesses who have since died. This is considered as immaterial on the question as to whether the finding of the Trial Court, on rental value, was against the manifest weight of the evidence, as we cannot say that such was the case, even had such testimony been considered competent.

The decree of the Circuit Court should be modified so as to require Finn to account for his profit on the stock transaction of the Virginia Building and Savings Association, with interest, and to that extent, directions for modification are ordered, otherwise said decree is affirmed.

The Circuit Court is hereby directed to modify its decree as herein provided, otherwise said decree is affirmed and said cause remanded for such modifications.

Decree affirmed in part, reversed in part and remanded with directions.

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## STATE OF ILLINOIS

Lebruary Term. 9.0, 1946

Gen. No. 9488

Agenda No. 7

Millie E. Stombaugh, et al., )
Plaintiffs-Appellees, )

VS.

Henry H. Morey, et al., Defendants-Appellants) Appeal from the Circuit Court of Macon County.

Wheat, J.

320 I.A. 397

Appellant, Henry H. Morey, has appealed from an order of the Circuit Court of Macon County taxing as costs an allowance of \$1300.00 for Plaintiffs' solicitor's fees in a partition suit in which he was a defendant.

Edward F. Carr, by his Will probated in 1919, left to his wife, Mary Carr, a life estate in the real estate in question, with remainder to his daughter, Millie Stombaugh, and his son, J. Arthur Carr. Mary Carr, the widow, died on November 18, 1942, and immediately thereafter, Millie Stombaugh filed the partition suit. In 1937, Henry H. Morey received a sheriff's deed for the one-half interest of J. Arthur Carr, as a result of sale under certain judgments.

In her partition complaint, Millie Stombaugh alleged that through her father's Will, the death of her mother and the sheriff's deed to Morey, that the lands were owned in equal parts by herself and Henry H. Morey, Thereafter, counterclaims were filed by Morey, asking for an accounting

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as to rents, and by J. Arthur Carr, charging that the sheriff's deed to Morey was void and that he, Carr, was the owner of one-half of such property.

the circuit Court entered a decree finding that
the sheriff's deed to Morey was void and directed that
partition should be made between Millie Stombaugh and
J. Arthur Carr, but that the latter should pay Morey the
amount represented by the judgments. From that decree,
Morey prayed an appeal to the Supreme Court, where such
decree was reversed and the Circuit Court was directed
to enter a decree awarding partition between Millie Stombaugh
and Morey in equal shares. (See Stombaugh v. Morey, 388 Ill.
392). This was done and the property subsequently was sold
by the Master to Millie Stombaugh for \$22,560.00, following
which, the Court allowed solicitor's fees for the attorney
of Millie Stombaugh to be taxed as costs. From the order
making this allowance, the appeal is before this Court.

Morey's contention is that no attorney's fees should be assessed in the suit as costs, because the suit was not an amicable one; that Morey was required to employ an attorney to protect his interests, and that the attorneys for Millie Stombaugh did not sustain in the Supreme Court her complaint filed in the Circuit Court.

While there is some merit in the contention that Morey was required to employ an attorney to protect his interests, yet it can be said, in general, that the contest was not between the plaintiff and Morey but between Carr and Morey. It is obvious that the ultimate finding as to owner-

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ship was exactly as alleged in the complaint. We believe the Supreme Court effectively and conclusively disposed of the questions raised by the defendant in this appeal by its findings in the case of Stombaugh v. Morey, supra, wherein, in reply to the prayer of Morey that future proceedings in the partition suit should be based upon his cross-complaint and counterclaim, it was stated, "The complaint filed by Millie Stombaugh set forth the judgment and proceeding by which appellant acquired his deed and alleged he was the owner of all interest devised to J. Arthur Carr. The contest arose between appellee (Carr) and appellant (Morey) by virtue of the counterclaims they filed. Attention is also called to discrepancies in reference to certain unreleased mortgages. These discrepancies as to interests are not sufficient to deprive plaintiff (Stombaugh) from proceeding with the partition under her complaint."

We find that the solicitor for the plaintiff properly set forth the interests of the parties in the complaint for partition, that the Supreme Court directed that the proceedings relating to the sale continue under such complaint, and that the allowance of attorney's fees as costs was discretionary with the There is no technical rule governing the exact Trial Court. apportionment of costs in a partition suit but the Court is required to apportion the costs equitably and no error occurs in taxing costs against the property unless the Trial Court abuses its discretion. (DeMartini v. DeMartini, 385 III. 128). We believe the discretion of the Trial Court was not abused in this case in the allowance of attorney's fees as costs against the property and the decree of the Circuit Court is therefore affirmed.

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## APPELLATE COURT OF ILLINOIS

Second District

rebruary Term, A. D. 1946 323 I.A. 3

THEODORE ORBAN and ALBIE ORBAN, Plaintiffs and Appellees,

VS.

CLARENCE MICHAL and JOHN O. STOLL. Defendants,

JOHN O. STOLL,

Appellant.

Appeal from Circuit Court, Lake County.

Bristow J.

This appeal comes to us from the Durage County Circuit Court where judgment was entered for plaintiffs and against appellant John Stoll in the total sum of \$52,500.00. There was an automobile accident that occurred on State Route 21 4 in Lake County on February 23, 1941 4 wherein Theodore Orban was frightfully injured. Fifty Thousand Dollars (\$50,000.) of the judgment was entered in his behalf. Theodore's wife, Albie, was much less seriously injured. She was awarded Twenty-five Hundred Dollars (\$2,500.) by the jury.

On December 17, 1941, the plaintiffs filed their complaints naming Clarence Michal as the sole defendant and charging him with operating his automobile negligently in six different respects. He was also charged with wanton and wilful misconduct. To this complaint Clarence Michal, on February 17, 1942, filed a pleading denominated "Answer and counterclaim," in which he alleged due care on his part and charged plaintiffs with being negligent and also with wanton and wilful misconduct. Defendant Michal claimed damages in the sum of

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Five Thousand Dollars (\$5,000.) Plaintiffs answered the counterclaim on March 6th, 1942.

on February 18, 1943 plaintiffs filed their amended complaint, making John D. Stahl a new party defendant. To this amended complaint Michal filed his answer and counterclaim, claiming damage in the sum of Ten Thousand Dollars (\$10,000.) and alleging substantially what was contained in the pleading first filed. John D. Stahl was charged with regligently driving his automobile upon route 21 M when he could not do so with reasonable safety and without not giving any warning of his intention to do so. On April 2, 1943, Stoll filed his answer to the complaint and counterclaim, claiming to be free from negligence. On November 29, 1944 plaintiffs amended their amended complaint increasing the ad damnum to one Hundred Thousand Dollars (\$100,000.) and making the defendant's name to appear correctly, namely John O. Stoll.

This is what happened: - On Sunday afternoon at about four thirty- a clear, dry day- four automobiles were proceeding southward on State Route 21 at a point about four miles south of the Village of Halfday. The highway at that point was paved with concrete and consisted of four lanes of ten feet each. Defendant Stoll in company with Major Templeton of the U.S. Army was driving south from his home in Northbrook enroute to chicago. He drove his car completely off the pavement onto the west shoulder and stopped and fixed the left side of the hood which had become unfastened. The second car appearing on the scene was that of defendant clarence Michal. He was driving southward, occupying the west lane, traveling at about twenty miles per hour, and accompanied by his wife who was riding in the front seat with him. The third car was driven by clarence's brother, George Michal. It was proceeding in the same lane at the same rate of speed and about fifty feet to the rear of his brother. The Michal brothers had come from the summer home of George which was located in McHenry, Illinois about thirty miles from the scene of the accident. The fourth car, occupied by

Five Thousand Dollars (45,000.) Flainth its answered on auronay.

On Tebrusty 13, 1943 pleintiffs filed their enemons corolaise, making John 1. Stabl a may party defeadant. To this ustaded complaint Michol filed has enswer and ocunteralsia, alaiding denned in the sum of real Thousand voling ((11), vol.) and allapin, so a stantifily what was contract in the placeting films file. Since their stable was observed with asphasement defining the automorphise and the real do to to den traced ble outsty and filted not could be satisfied out the desire of the desire of the first out to a to the contract of the file of the file of the contract of the contract

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the plaintiffs, was proceeding southward in the inside lane of the second lane from the west. It was being driven by Mrs. Orban, and her husband was seated to her right. Their home was at Round Lake Beach, seventeen miles from the scene of the accident, and their destination that afternoon was Berwyn, Illinois, where a sister of Mrs. Orban's resides.

Mrs. Orban first saw the Michal cars when she was four or five hundred feet north of the man as she was passing the car of Clarence Michal, he turned to the left, whereupon the left front fender of Clarence's car struck the right front fender of the Orban car which "wobbled" down the road and crashed into a tree on the right side of the road. Stoll testified that after he had fixed the hood he climbed back into his car, looked in the rear view mirror, saw traffic coming some two to three hundred of his car, feet to the north, flashed a light on the rear, and proceeded to gradually nudge his way back on to the pavement.

clarence Michal testified that Stoll's car pulled right on to the pavement, thus necessitating him to swerve suddenly to the left, and that in doing so he struck the Orban car. Clarence's Stoll's wife, Ellen, testified that Orban's car suddenly got in front of them and that her husband had to swerve sharply to the left. George michal testified that Stoll pulled out suddenly without giving any warning.

Mr. Orban testified that when his car reached the clarence Michal's car, the stoll car turned left in front of it, the Michal car, which ran into his car. He said the Stoll automobile entered onto the pavement at a 45 degree angle. He also said the motor raced and car wobbled and struck a tree, and his next consciousness was at the hospital. Albie Orban testified that she did not see the Stoll car at any time, and when the collision with the Michal car occured, she was thrown against her husband, and her foot seemed to be pressed upon the accelerator, then they hit a tree and she looked down and saw the bone of her ankle "sticking out".

the plaintiffs, was proceeding southward in the incide lane of the second lane from the west. It was being driven by its. That, and her husband was seated to her right. Their how was at wound lake Beach, seventeen wiles from the seate of the oppident, and their destination that effer our was servy, illiners, there a cister of the. There exister of the collect.

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clarence vioted restifies and tell's car pulses right on to the parent three parents in the last, and that is daing ac ne serve the restore and that is daing ac ne serve the restore. It is allen, testified that the testified that the restore and restore and that her bushead had to energing to the test.

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what transpired after the collision must be given some attention. George Michal testified that Stoll was leaving the scene of the accident; that he stopped him with the warning that he was the cause of the accident and should wait for the police; and that Stoll said, "There is nothing the matter with me, to hell with him". He further testified that Stoll was mumbling, smelled of liquor, and in his opinion was drunk. Ellen Michal testified that her husband clarence stopped the Stoll car, and that she talked to Stoll. She told him that he had caused the accident and was not going away. His reply to her was that he was on his way to chicago and "didn't have time to bother with these people". She further related that he "started swearing"; that he was blurry-eyed and smelled of liquor; and further said, "I know the man was drunk".

As to this feature of the event, Stoll testified, that Major Templeton, upon discovering the seriousness of the accident, went to the nearest telephone and called for the police and an ambulance. He admitted that, while waiting for the major's return, he was sitting in his car and was approached by a man and lady who said he was responsible for the accident and he replied, that "If you will examine my tracks on the grass, indicating my gradual approach to the highway, you will see I was in no way responsible." Stoll further testified that he showed the police officer his tracks, gave him his name and other information requested of him by the policeman, whereupon he left the scene of the accident with the officer's permission. He testified that he had one drink before dinner and was not intoxicated.

Russell Bott testified that he was a member of the peerfield police force and deputy Sheriff of Lake county, and that he came to the scene of this accident as the result of a phone call. He corroborated Stoll's account with respect to the automobile tracks on the shoulder and said he talked to and observed the defendant and said he was not in any way under the influence of liquor.

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Major Templeton, at the time of the trial was a Colonel fighting in Europe and did not testify.

on the day of the trial, plaintiff and defendant Stoll made a motion to dismiss Michal's counterclaim for want of prosecution which was allowed. Not in the presence of the jury, the court interrogated clarence Michal who said his attorney, Bernard Decker, had quit him because he could not pay his fees. At the close of the plaintiffs' case, their counsel announced in the presence of the jury, "Inasmuch as there is no apparent negligence on the part of clarence Michal, I ask that he be dismissed as a party defendant to the suit." This motion was allowed.

Stoll offered in evidence the several answers and counterclaims of Clarence Michal filed on February 17, 1942 and February 23, 1943, and explained that has pleadings be stated that the Orban car was traveling in excess of sixty miles per hour. The trial court sustained an objection to this offer. counsel for appellant insisted that the trial court erred in this respect. Appellant advances the theory that such evidence was admissible for the purpose of showing the interest of clarence Michal. The jury was fully informed of the fact that clarence Michal had been a defendant and a counterclaimant, and in that respect was vitally interested. There was no foundation laid for his impeachment, and Michal no longer being a party defendant but simply a witness, pleadings are not admissible to contradict

Needless to say appellant made motions for directed verdict at the close of plaintiffs' case and at the close of all the evidence. It is argued here that the court erred in overruling these motions.

Appellant contends that both plaintiffs were guilty of contributory negligence. To support this argument it is claimed that Mr. Orban should have told his wife that Stoll's automobile was about to enter upon the pavement and caution her to be on the alert. It is further claimed that Mrs. Orban should have seen the

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On the day of the trial pleistiffs and defendant stall souds a motion to dismiss mispat's soundershift for that of presention which was calouse, Not in the presence of the jury, the court interrogated viscence Tichel who said his alternoy, Dermerá Jehal, had quit him becames he could not pay his form. At the close of the plaintiffs' case, their commack anacquaed in the or exact of the jear, Tursmuch as there is a movement as there is a court of the sair. Michal, I sak that he or dissinger a court, the court of the sair.

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Appellant course do they both plaintiff fore guilty or contributory negligence. To appear this organism it is claimed that Mr. Orden chould have rold his wife that while automobile was about to enter upon the perement and coutton her to be on the clert. It is further ulaimed that Mrs. Orden chould have seen the

stoll automobile, and should have reasonably anticipated that it would turn suddenly in front of the Michal car, and should have anticipated the swerving of the Michal car to the left, and, if she had done so and managed her car with due regard to those conditions, the accident would not have happened. Appellant's counsel cite many cases in support of their argument, but all are clearly distinguishable from the instant case. we do not believe that the court erred in overruling defendant's motions for directed verdict, nor do we believe that the jury was not justified in finding by 11.75 verdicts that both plaintiffs were in the exercise of due care for their own safety.

Appellant further contends that the verdicts were excessive, and that the trial court erred in giving certain instructions relating to damages. Instruction number two stated that it was unnecessary for any witness to have expressed an opinion on the amount of damages, but that the jury could "make such estimate from the facts and circumstances in proof." And in instruction number three this language was used: "in determining the amount of damages, the jury has the right to and should take into consideration all the facts and circumstances as proved by the evidence before them." It will be noted that in neither instruction was the jury's determination of the amount of damages limited to the evidence with reference to damages. In Garvey v. The Chicago Railways Company, 339 Ill. 276 a damage instruction contained this language: "In determining the amount of damages \* \* \* have a right to take into consideration all the facts and circumstances you believe are proved by the evidence before you." In condemning the giving of that instruction, but not reversing therefor, the court said: "An instruction which does not require the assessment of damages to be based upon evidence as to damages for which the law allows recovery is improper." (Illinois Central Hailroad Company v. Johnson, 221 Ill. 42.) We do not believe the appellant is in a position to take advantage of this error in this court.

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The Court: "We will first take up the plaintiffs' instructions."

Mr. Runyard: "There is no objection to plaintiff's instructions
numbers 1, 2 and 3."

Mr. Runyard: "There is no objection to plaintiffs' instructions numbered 4, 5, 6, 7."

In the case of Rohrhof v. Schmidt, 218 Ill. 585, the court said:
"It certainly will not be contended that appellant could be permitted
to sit by and see the court do things which he claims to be injurious
to him and make no objection, and then, upon appeal, assign these
same acts as error and have the decree reversed on that ground."

The Supreme court in Western Springs Park District v. Lawrence, 343 Ill. 302, states at page 311: "Even if there was error committed, a party cannot complain of an error which he induced the court to make or to which he consented. People v. clements, 316 Ill. 282; McKinnie v. Lane, 230 id. 544; Glos v. Murphy, 225 id. 58; conness v. Indiana, Illinois and Iowa Railroad Co., 193 id. 464; Oliver v. Oliver, 179 id. 9; Smith v. Kimball, 128 id. 583; 2 R. C. L. 238."

Also in Kellner v. Schmidt, 328 Ill. 426, the court says at page 430: "There is no principle of law more familiar than that a party shall not be permitted to assign for error that which the court has done at his request or with his consent. Consensus tollit errorem. (Nixon v. Nixon, 268 Ill. 524; People v. Zimmer, 238 id. 607; McKinnie v. Lane, 230 id. 544; Sheridan v. City of Chicago, 175 id. 421; Cheney v. Ricks, 168 id. 533; Smith v. Kimball, 128 id. 583.)"

As we have indicated, the plaintiff Theodore Orban was terrifically injured. He suffered a fracture of the pelvis, and there was a fracture of the neck of the femur and the public bone on the left side. Also he suffered a concussion of the brain and remained in a state of shock and confusion for a long time. There

Before the instructions were read to the fury and we of lastry presence, the coert and nounced for all purities have the over all instructions and this what transported.

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was a contusion of his stomach which the doctor said necessitated an operation wherein eight inches of the small intestine were removed. During the period of hospitalization his condition was pronounced critical for several weeks. Many blood transfusions were given. Turing the first four months of his illness, his weight dropped from 155 pounds to 87 pounds. In Teptamber, 1941, Orban went home from the hospital, but from that time until May, 1944 he was confined to his home, and for a greater portion of that time was in bed. By May, 1944, the left leg atrophied, shrivelled, and shortened until it was four and one-half inches shorter and two-thirds the size of his right limb. At the time of the accident Mr. Orban was 48 years of age, and during the year prior thereto earned \$3,700,00 as a tool maker. The evidence abundantly shows Orban to be a complete physical wreck. We do not believe \$50,000.00 was excessive.

The court in passing on defendant's motion for a new trial used the following language: "The verdict is so high and there is some other peculiar circumstances about the case, particularly that this defendant was not made a party until four days before the two years had expired, and the other defendant being later dismissed out of the case the hast moment. It is a peculiar case. However, I cannot grant a new trial just because a case is peculiar, I must have some alleged grounds for granting a new truial." We agree with the court that this is indeed a peculiar case. Indeed it is so strangely peculiar that we believe that justice demands that this case be retried.

The testimony of the two Michal families is so inherently improbable and contradictory that it is worthy of little belief. Clarence Michal, in February, 1942, was a defendant. Later he filed his counterclaim, claiming damages in the sum of \$10,000.00, and charging the Orbans solely, with causing his injuries. He specified in his plead-

were a contust in o his stor oh which . . . other contust in o emon of larging the little of the select people united at the theory we removed. Further the tipe to the little of the training the tenders, where meanigent exites it is not a common to be a state of a companion wers given. Turing the Clinic I for the out to think the court າ ວາດ ເຊິ່ງ ເປັນ ເປັນ ປະຕິດ ຊື່ວ ເຕັດ ຊື່ວ ເຕັດ ຄວາມ ວິດ ຄວັດຍາ ຕົວປຸດ ຕົວປຸດ ກ້ອງວຽງເຄ Apply the first transfer of the contract profession of the contract of the াল নাক হল লাভ লাভ হৈছে **এ** লাভ কৰি ইছাৰ লাভ কৰি লাভ কৰি rent great and other beauty Millian to be factored and t deserve and \_ \ . . . . the control of the second of the control of the con and the first of the same The state of the s As a delined .

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ing six different respects in which the Orbans were careless. Yet, appellant Stoll was not brought into the picture for almost two years. Then we find at the time of the trial that Clarence Michal discontinued being a defendant and counterclaimant, and suddenly became a very willing witness for the plaintiff and against the defendant Stoll. Clarence no longer was of the opinion that the Orbans were at fault; that they were driving their car at a speed in excess of sixty miles per hour; that they were negligent in the several respects as he had previously indicated in his counterclaim, But, he suddenly, after a lapse of several years, and by some "peculiar" process concludes that Stoll was the guilty one, Why he would not do so at the earliest possible moment is no doubt one of the peculiar aspects of the case that the Court had in mind when he made his pronouncement.

Can you visualize that, if a drunken driver were to turn sharply in front of you into your lane of traffice causing you to duddenly trun into and collide with a third car, you would first blame the driver of the third car for causing the accident instead of the drunken driver who thurned sharply in front of you?

On the day of the trial, the entire Michal family displayed themselves as hostile, bitter and biased witnesses against Stoll. The testimony of George and Ellen Michal in particular are replete with molunteered conclusions that were calculated to create strong feeling against defendant Stoll. They were anxious and willing witnesses, seeking at every opportunity to leave with the jury the impression that Stoll was drunk, endeavoring to flee and leave the scene of the accident; that he used profamity when he was sought to remain and take an interest in the injured persons. The only disinterested witness was the policeman who testified that Stoll was not under the influence of liquor in the least. It does not seem reasonable that the officer would have released him so promptly had he been

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in a state of intoxication as described by the Michals. The policeman was certainly in a position to know, and it was his business to know if Stoll was intoxicated. He walked and talked with Stoll, and he was shown the tracks that his car had made on the grass shoulder as he had gradually "nudged" his way back onto the pavement. The tracks showed no abrupt, forty-five degree turning of his car.

The plaintiffs' case was almost wholly dependent upon the testimony of the Michals families. Inherent in the testimony of Clarence Michal are so many improbabilities and contradictions that its falsity is demonstrated. His story, as related on the witness stand when considered in light of his declarations made previously, is quite contradictory to the laws of universal human experience, and is beyond the limits of human belief. The other Michal witnesses were doubtlessly under the domination of Clarence Michal, and their credibility consequently loses its weight. The jury was never told about the inconsistent and contradictory positions taken by Clarence Michal in his pleadings and his testimony. Foundation for his impeachment should have been laid. Upon a retrial this will doubtlessly not be overlooked.

In view of the unsatisfactory character of the proof offered on behalf of the plaintiffs, and in view of the convincing character of the direct and positive proof of a completely disinterested witness offered on behalf of the defendant, we have reached the conclusion that the verdicts in this case are contrary to the manifest weight of the evidence.

Cause reversed and remanded for new trial.

REVERSED AND REMANDED

in a state of intertion as described by the Michala. The policement was certainly in a positive to know, and it was his outpean to know if Stoll was intexicated. He walked and telest with Stoll, and he was shown the tracks that his car had made on the grass shoulder as he had gradually "nulsed his wy to of onto the paramet. The tracks showed no abrupt, forty-five described this can.

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Clarence Michal are so many is repositifiated on confinitely. The falsity is denoted that its felicity is denoted that. The story, so melical on the vitues exact areatously, is authors considered in light of his lector it one exact areatoreviously, is author confirmation to the lews of universal burden examples each to be less of the less of universal burden whichely witnesses many continued the the factor of the other victors, each witnesses many continued the veight. The forms teken by should shout the victors from all order industry continued that the testion in controlled to the following the second that the testion for its incompanion should here been leaf. There exists foundation for its incompanion should her been leaf. There exists

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IN THE

## APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1945

CHIQGO TITLE AND TRUST COMPANY AS TRUSTEE UNDER TRUST NO. W 19162,

Plaintiff.

VB

A. L. WALKER, APPELLEE and CARL WENDLEY, APPELLANT, DEFENDANTS.

328 I.A. 399

Appeal from Circuit Court
Du Page County

7045

Bristow, J.

\* \* \* \* \* \* \*

In the Circuit Court of "u Page County, the Chicago Title and Trust Company as trustee under Trust No. W 19162 filed an interpleader proceeding wherein it was claimed that A. L. Walker, appellee, and Carl Vendley, appellant, were real estate agents, both claiming to be the procuring cause of the sale of certain real estate to William Rapp and Evelyn Rapp, his wife. The Chicago Title and Trust Company deposited Two Thousand/thirty one dollars and twenty cents (\$2631.20) with the clerk of the Circuit Court, and prayed the court that appellant and appellee be made parties defendant; that they be required to file their respective answers setting forth their claims to this real estate commission; and that there be entered an injunction restraining Walker from prosecuting a certain suit that he had instituted in the Cincuit Court of Du Page County wherein he sought recovery of his commission. This injunction was granted and made permanent, and the answers of appellant and appellee were filed, and trial was had without a jury. The trial court entered a finding and judgment for appellee Walker for the sum of money deposited by the Chicago Title and Trust Company.

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A Mrs. Heineman, who loved in Hinsdale, Illinois, owned a life estate in a business property, which property after her death was sold to the Rapps. This real estate was located in Hinsdale, and shell be referred to hereafter in this opinion as the Walgreen property. Next to this property, there was located the Oswald building. In this Oswald building Rapp conducted a bakery business, and on the second floor of it Walker had his offices where he conducted his real estate business. Walker had been a resident of the village of Hinsdale for more than twenty years, and throughout this period was a duly licensed real estate broker. He was the managing agent of the Oswald building, and in that capacity had many business transactions with Rapp. Walker also sold Rapp's residence to him in the Village of Hinsdale.

Walker's testimony concerning his dealings with Rapp in the instant case runs as follows. Some time during the year 1943, Rapp came to Walker's office and stated that inasmuchas his bakery business was proving quite profitable he was accumulating some surplus money which he desired to invest, and that he was thinking of buying a business building, and asked Walker to see what he could find for him. Walker told him that the Oswalf building had been for sale and that the price was around \$40,000. Rapp's reply was that it was something to think about, and asked what else he had to offer. Walker and Rapp talked of several other pieses of property that might be purchased and the prices that might be considered. Then Mr. Rapp inquired about the Walgreen property, and Mr. Walker's reply was that Mrs. Heineman had a life estate in said property, and that it would not be ready for the market until and after her death. After this lenghty discussion, Rapp told Walker that he would look over some of these properties and would talk to him later.

A Mrs. Heinemen, who layed in Hinsdels, Illinois, owned a life estate in a business property, which property after her death was sold to the impos. This perl estate wis located in Hinsdels, and shall be referred to hereafter in this opinion as the Malgreen property. Mark to this property, there was located the Oswald building. In this Oswald building Hapo conducted a bakery business, and on the second floor of it Walker had his offices where he conducted in real estate ouslands. Valker had been a resident of the village of Hick wit for more than twenty years, and throughout this o city was a duly licenced row; estate broker. The was the managing pool of the Car little Her capacity had sent business then city as the Marker. The was the managing pool of the Car little Hero. Welker

Welker's testimnly concerning his lealings with Eson in the instent case runs as follows. Bome time surjug the year 1947, Rapo dame to Talver's affice and alaret that insegnones his bakery business was accorder outle modificials be was socuruistaing some supplies money which he derived to invest, and that he was frinking of buying a busingss but lotter, and asked Marker to see what he could find for him. . . here told aim thet the Oswald building had been for sale and the the order was evenue (40,000, Rapp'e reoly was that it was somewhite to think above, and carely what also be had to offer. Telies and Resp telked of searmal other please of property that which be surchesed and the prices that might be considered. Then Mr. and a inquired about the Walgreen property, and Mr. Walker's reply was that Mars. Weineman had a wife estate in said property, and that it would not be ready for the market until end after her derth. After this lenchty discurrion, Rapp told Walker that he would look over gone of these properties and would talk to him later. Walker further testified that Rapp came to, him some time in October in 1943, and expressed an interest in the purchase of the Oswald building, but Walker told him that it had already been sold to another baker named Carney who lived in La Grange, Illinois. Rapp on this visit indicated that he desired Walker to continue to try to find a building investment for him. Walker further testified that Rapp's next visit to his office was in December, 1943 wherein Rapp told him that he was very much concerned about his lease; that inasmuch as the new purchaser of the Oswald building was also a baker, he might want to take possession of the premises and not renew his lease which only had a short time to run. Walker obtained for Rapp a five year lease dated December 15, 1943.

Later on in December, 1943, Mrs. Hieneman died, and on the 19th day of that month Mr. Corbin of the hicago Title and Trust Company called Walker on the phone and engaged him to menage the Walgreen property. On the same day Walker phoned Rapp and asked him to come to his office, which Rapp did. Walker told him of Mrs. Heineman's death, and that he was assuming the management of the building, and that he was of the opinion that it could be purchased and asked Rapp if he wasstill interested in such a proposition. Rapp inquired as to what the price would be and asked if there were other persons interested in buying it, and requested Walker to keep in touch with him regarding the same.

Mr. Corbin came out to see Walker on the 21st of December, 1943, and brought with him the management contract. At that time Corbin asked Walker if he knew of anybody that might be interested in the purchase of the Walgreen property, whereupon Walker gave him the names of Repp, Laue, Davidson, and Reinke. Corbin at that time told Walker that he was not sure as to what the price would be, but he thought that it could be purchased for \$60,000 to \$65,000. Corbin and Walker then had a discussion about the sales of other properties of like character in that vicinity, and Corbin upon leaving requested Walker to attempt to find a purchaser.

Welker further to the street of the test of the solution of the surches of in October in 1947, and element in October in the Same of the Osweld outliffs, such element in interest in the Osweld outliffs, such 'alies in in 'all his is in the Same of the Osweld outliffs, such 'alies in the Same in the Osweld outliffs and the outliffs and the Same in the S

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Walker further testified that on that same day, he telephoned Rapp to come to his office. Whereupon, he related to him all the conversation he had had with Corbin. Rapp replied that the price was ridiculous; that no one would pay so much for such an old building. Rapp said he wanted to see the leases, and that he would like to know the cost of maintaining the building and the taxes. On December 23rd, Mr. Corbin came to Wahker's office and brought all the leases except the one on the premises occupied Walker told Corbin that that was the one that Rapp. a prospectibe purchaser, was interested in seeing, and that he would like to have it in his office soon for Rapp's inspection. On that day Mr. Corbin and Mr. Walker visited all the tenants in the Walareen property and notified them of the change in management. same day, Walker requested Rapp to come to his office again. this occaseion Rapp inspected the leases and inquired about the one with Walgreens, whereupon it was explained that it would be available in a few days. Rapp stated at that time that the rentals should be increased considerably. Mr. Corbin sent by mail the Walgreen lease to Walker on December 31, 1943. So, on January 4, 1944, Rapp was again called to Walker's office when he was shown the Walgreen lease which contained a rental figure of \$250. this visit Walker and Rapp discussed the taxes, insurance and heating cost. Also, on this occasion Rapp informed Walker that he was not in a position at that time to make an offer inasmuch as he was not sure about his draft status; that in the event his classification was changed and he should be inducted into military service, he would not want to undertake such a big deal.

Throughout the month of January, 1944, Mr. Rapp and Mr. Walker had several interviews on this subject. At one of them Mr. Rapp stated that he would not pay more than \$45,000 for the property, and that he was still unwilling to make an offer. He

Malker further testified th to on thet same lay, he telechoned Rapp to cour to his office. Thereupon, he relieve to him all the conversation has not help for bin. The conversation of help ship the prior was rificulties that no energial may all much for anohan oit buillian. Heneril he wort the ear the la cer, and that he would like to been the cost of maintaining the building and the tarmes. On leasuber with, it. Porble over to indirete office isiquano soldos, aff un sociado tot despre carrel edfills thisporto fos by Walgara. Maleon this Geable that the time are the continued the a procedent of the land of the arm which is not the contract of the following a live to have it in his office want for Argain and cortain. The dist log Mr. Combin in City, me tilen eller eller tennate en les eller de Combiner. commoney in the most in the second of the parent to be not independent ing the second of the control of the first energy of a fire this acc. elem B more appropriate lesson of active con-40£ w long the πf long for bull broad at long long to an expected "Motive edit iliko e erene eta eta eta kija kiji eta eta eta erene edifiziolaria TREESTAND IN THE SECOND OF THE SECOND CONTRACTOR local throat the second following the second property The second projection of the entropy of att para de la ville de la comitación de la comparación de tracer. El comitación de la comitación de la comitación ing dost. Also, on this openion for the state gain ್ರಾರ್ಟ್ ಚಿಕ್ಕಾರಿಯ ದೇವರ ಕ್ರೀರ್ರ್ ಮಾರ್ಕ್ ಕ್ರಾರ್ಟ್ ಕ್ರರ್ಟ್ ಕ್ರಾರ್ಟ್ ಕ್ರರ್ಟ್ ಕ್ರರ್ಟ್ ಕ್ರಾರ್ಟ್ ಕ್ರಾರ್ಟ್ ಕ್ರಾರ್ಟ್ ಕ್ರಾರ್ಟ್ ಕ್ರಿಕ್ಟ್ ಕ್ರಾರ್ಟ್ ಕ he was not early chook hid denth et that the best count but dear ification was changed as a boschould be delicated into eithermy service, he would not wont to un estate ench e bit it l.

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also asked Walker to give him an opinion asto what he could obtain for his residential property, and Walker replied, #\$11,000 or \$12,000."

On January 28th, Walker wrote the Chicago Title and Trust Company submitting an offer by a Mr. Laue. This was rejected by a letter from a Mr. Peterson who held the title as head of the sales department. It is claimed by Carl Vendley, appellant, that Corbin was attached to the managing rather than the sales department, and that he had no authority to employ Walker to sell the property in question. Walker offered in evidence the letter referred to above from Peterson which reads as follows: "We hope you will be successful in submitting an acceptable offer for this property. Licensed brokers will be entitled to commissions at the Chicago Real Estate Board rate only after offers submitted by them have been accepted in writing by us and sales completed. " We agree with Walker's contention that giving consideration to this letter and all the facts and circumstances adduced on the subject, Walker was fully authorized to sell the property in question and expect the usual commission if he was successful.

During the month of Merch, 1944, Rapp and Walker discussed the same subject, but with no different result. Mr. Walker further testified that on one of Corbin's many visits to his office, Mr. Corbin had pointed out to him Mr. Rapp as the man who might buy the building, and Mr. Corbin is alleged to have said, "The man in overall?", and "r. Walker replied, "Yes, he wears them in his bakery business." Again in April, 1944, Rapp came to Walker's office and examined the leases, and inquired if a change in the heating plant would not affect a reduction in the heating cost. Mr. Walker advised Mr. Rapp that the heating engineer of the Chicago Title and Trust Company, a Mr. Cartland, had recommended such an improvement. Rapp told Walker then that he thought he would be able to make an off soon; that he would be able to successfully negotiate the deal

also asked Welker to give him an opinion sto what he could obtain for his residential property, and Walker replied, #\$11,000 or \$12,000.

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without selling his residential property inasmuch as his business was improving; and that he had some financial backing.

named Schmidt came to Walker's office and discussed a matter involving Schimdt and an attorney from Downers Grove by the mane of
Carlson. It seems that Rapp disliked Walker's attitude in the
matter and made this statement, "I will have no more business with
you; this is going to be unprofitable, and I will do no more business with
ness with you at all." This concluded Walker's relationship with
Rapp. A reading of the record discloses that the foregoing substantially details most of the dealings between Walker and Rapp
as testified to by Walker. There were a few other visits and
interviews and incidents, a recitation of which would unduly lengthen this opinion without serving any helpful purpose.

Rapp thok the stand on behalf of appellant, Carl Vendley, and testified that he never discussed with Walker the subject of the Walgreen property in his life. Rapp testified that he first learned that the property in question might be for sale in April or May, 1944, and that he gained such information from William Laue, a plumber in Hinsdale. He further testified that it was not until the latter part of June, 1944 that he finally learned of his deferrment by his draft board; that up till that time he had no interest in purchasing any property; that then he went to call on Mrs. Heineman and found that she was not at home; that upon telephoning Mrs. Heineman had died, and/referred him to the Chicago Title and Trust Company when he inquired concerning the status of the Walgreen property!

Rapp further testified that he called John Kavenaugh, his personal attorney, who introduced him to Carl Vendley; that Vendley interviewed Rapp some time in August; and that it was through him solely that he acquired information about the Walgreen building, and also through him that after several offers the building was finally purchased for the sum of fifty five thousand dollars (\$55,000).

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Rapp further fortified thit has collect Jan Kavenaugh, his personal attorney, who introduced him to Ger. Wendiry; that Veniley interviewed Rapp some time in August; and that it is through him solely that he acquired information about the believed building, and also through him that after several offere the building was finally purchased for the sum of fifty five thousand dollars (\$55,000).

Pearl Dumphy corroborated the testimony of Rapp that he telephoned the Heineman home and made inquiry about Mrs. Heinemanman and the property in question. Walker is corroborated in his testimony in several particulars by two witnesses namely, Mary Hanson and Iona Jeffery who were stenographers employed in Walker's office at various periods during the alleged negotiations between Walker and Rapp. It appears that Mary Hanson who had been regularly employed as Walker's stenographer bacame a mother some time in November, and that immediately prior thereto and for several weeks thereafter she was in his office only irregularly.

Leon D. McKendry was called as a witness on behalf of defendanty notice. It appears from his testimony that he was one of the tice-presidents of the Chicago Title and Trust Company, and that he is a manager of the department that supervises sales of property. He testified that the sale of the Walgreen property was made through Mr. Vendley for the sum of \$55,000; that Mr. Peterson, who had written Mr. Walker, was also in the sales department; and that in view of the correspondence between Peterson and Walker, Walker could rightfully assume that he was employed to sell the property in question.

Franklin N. Corbin, testifing on behalf of Vendley, testified that his duties with the Chicago Title and Trust Company pertained to the supervision of real estate, the collection of rents, and the maintenance of the property. His testimony in the main corroborated that of Mr. Walker with the exception that he did not remember the incident of having had Mr. Rapp pointed out to him as a prospective purchaser of the Walgreen property.

We believe that the foregoing fairly outlines the testimony adduced on behalf of the parties hereto, Walker and Vendley. It is obvious that there is sharp conflict in the testimony of the two. It is utterly irreconcilable. One of them certainly committed rank perjury. The trial court, by his findings, has placed that stigma upon Rapp. Giving consideration to all the authorities

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cited by both appellant and appellee in their briefs, we are justified in concluding that assuming that there was a valid listing of
the property in question by the plaintiff with Walker, and assuming
that the trial court placed credence in the testimony of Walker,
then the result is irresistable that Walker was the procurring
cause of the sale of the Walgreen property and thus entitled to
the commission for selling the same.

It appears that Walker was the first person to talk to Rapp about the purchase of this property. It was Walker's efforts that developed in Rapp a desire to buy. Where a borker is the efficient cause of producing a purchaser who is ready and able to buy upon the terms fixed by the owner, the broker will be entitled to the compensation agreed upon. Groome vs Freyer Engineering Company 374 Ill. 113, 125.

In the case of <u>Brancisco</u> vs <u>Goleman</u>, 230 Ill. App. 465, the why plaintiff Francisco was a real estate broker and the defendant Coleman listed with Francisco a farm in uPage County which was wwned by Coleman and other members of his family. This farm was listed with Francisco in November, 1920. On December 9, 1920 Francisco introduced Lee as a prospective purchaser, to the owner. Lee eventually bought the farm by contract made January 17, 1921 wherein the firm of Stewart & Stockwell acted as the brokers. Francisco brought suit to recover as broker's commission and this court said, page 469: "There is no dispute about Lee having been first produced by the plaintiff and it cannot be seriously doubted that Lee never waivered in his intention to buy the land from the time he looked at it on December 9. It was not necessary for the trial judge to determine just what prompted Lee to endeavor to close the deal through some one else than the plaintiff. It is apparent that he had some purpose which seemed to be sufficient to him. His breaking off of negotiations with the plaintiff and taking them up with another brokerage firm was not the result of any decision on his part not to buy the land. The circumstances surrounding

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the transaction were such that the defendant Coleman ought to have known that his agent Francisco was not being firly treated.

Almost from the first he suspected that Stewart & Stockwell's customers was Lee. He was repeatedly admonished by the plaintiff that is the customer turned out to be Lee, he would be asked to pay plaintiff the commissions agreed upon. Coleman saw fit to let the matter drift and closed the deal through his new brokers without making any effort to protect his original agent, who was unquestionably the procuring cause of the sale. Under such circumstances the defendant cannot avoid the payment of the commissions agreed upon. Rigdon vs More, 226 Ill. 382; Ogren vs Sundell, 220 Ill. App. 584; Hafner vs Herron, 165 Ill. 242.

Other Illinois cases supporting the validity of Walker's claim for commission are Wright vs McClintock, 136 Ill. App. 438, 441; Ellis vs Dunsworth, 49 Ill. App. 187, 191.

Vendley was employed by Rapp through his attorney, Kavenaugh. he was apparently engaged to buy the Walgreen property for Rapp as cheaply aspossible. No doubt Vendley should be compensated for his services, but we believe this to be Rapp's obligation.

In considering the rules of law that must guide this court in evaluating the force of the trial court's finding, it appears to make little difference whether this case shall be considered as on in Chancery or as one in Law. The appellant in his argument seems to favor the view that this case should be reviewed as one tridd on the chancery side. The conclusions reached by a chancellor should be sustained by a reviewing court unless they appear to be palpably erroneous. Phillip Carey Manufacturing Co. vs Weyganit, 143 App. 292. On the other hand, the finding of the trial court in a law case is not to be disturbed unless it is against the clear and manifest weight of the evidence. McGoorty vs Benhart, 305 Ill.App. 458, 462.

the braneaction were such that the defandant Colonian aught to have known that his genty Frencises was not bother dirly treated.

Almost from the first he suggested that disert a Checkwell's customers as Lee. He was ness tealy a manished by the platscustomers as Lee. He was ness tealy a manished by the platstiff that if the customer turned out to be dee, he could be saked to pay pleiptiff the consistences agreed use. To make the first the constant of the customer without taken without taken any extent to look trakens without taking any extension to account bis actional continuations and extended the constant of the consistence customers the defactors of the consistence customers are the defactors of the consistence customers are the defactors of the consistence customers are the consistence customers are the consistence customers as the defactor of the consistence customers are the consistence customers as the consistence of the consistence customers are the consistence customers are the consistence customers are the consistence customers are the consistence customers.

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In constituting the locate of the two tends of this court in real states court in reclusting the locate of the tends is court lines as the material states of the little constitute that is not a selected as the Charcery are as one in the constitute to the argument seems to five the view that this court is result to result in the apprent about to the abancery with. The conclusions recome by charcellor about be suntained by a reviewing court value of the view that the states of the charce the states of the the class and the states of the the class and the states of the class and the states of the class and the states of the extended.

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The relationship between Walker and Rapp for more than seven years had been cordial. They occupied the same building, and when Rapp had any real estate problems he enlisted the assistance of Walker. He learned that the Walgreen property—according to his own testimony—was on the market in April or May, 1944. He did not become angry with Walker until the latter part of June, 1944. It seems unreasonable that he would turn to a stranger in the real estate business to help in this thransaction rather than go upstairs and see his old friend Walker. Iso, Rapp feebly explained his several proven visiths to Walker's office during the month of January, 1944 by stating that he went there at that time to secure a continuation of his lease on his bakery property. The evidence discloses, however, that on December 15, 1943, he had already secured that lease.

On the other hand, this observation may be made which lends support to Rapp's version of what transpired in this matter. In June, 1944, Rapp went to see Mrs. Heineman at her residence and found no one at home. Then he telephoned the residence and asked for Mrs. Heineman, and was informed by Mrs. Lumphy that she had passed away in December, 1943. Mrs. Lumphy, an unimpeached and disinterested witness, corroborates Rapp as to the conversation. It does seem strange that Rapp would call for Mrs. Heineman in June, 1944, if he had been told in December, 1943 by Walker that she had passed away.

The trial court saw and heard Rapp and Walker testify.

He was in a position to observe their demeanor while testifying.

We are confronted here with the long established rule that where
there is a conflict in the proof and the facts and circumstances
in evidence, by fair and reasonable intendment, will warrant the
finding of the trial court, trying a case without a jury, reviewing
courts will reluctantly, if ever, disturb such finding. Lowry vs

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Orr, 6 III. (1 Gilm) 70, 83; Saxton vs Drake, 191 III. App. 322, 325; Bouslaugh vs Schumecher, 270 III. App. 79, 83: Morgan vs Ryerson, 20 III. 344, 346; Thicago Rock Island R. A. Co. vs Crendell, 41 III. App. 234, 235; Tright vs Stinger, 269 III. App. 224, 232; Hert vs Wilson, 177 III. App. 510, 511.

The trial court in deciding this case was called upon to search out the truth and determine where the preponderance of the evidence bey between Rapp and Walker. We are only required to determine whether the facts, by fair and reasonable intendment, will warrant the finding of the trial court. We do not believe that the trial court was palpably erroneous nor that we would be warranted in holding that the trial court was manifestly wrong in his finding. The finding of the trial court is hereby affirmed.

JUDCMENT AFFIRMED.

Orn, 6 III. (1 Gilm) 70, 83; Sexton vs Erche, 101 III.App. 322, 825; Souslaugh vs Schumener, 270 III.App.7; 88: Sersen vs hyspean, 20 III. 344, 346; Interso Bock Island R. A. Co. vs Countil, 41 III. Apr. 234, 255; Int to vs Eigen, 360 III. Apr. 234, 247, 247; Hent vs Wilson, 177 III. Aps. 51.

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Gen. No. 10047

Agenda No. 2

## IN THE APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND DISTRICT

77

February Term, A.D. 1946.

GUY RIDGON,

APPELLEE

v.

HATTIE WAGNER CROSBY, APPELLANT. 3201.A. 3992

Appeal from the Circuit Court of Will County.

Dove, J.

The jury in an automobile accident case in the circuit court of Will County returned a verdict of \$4500.00 in favor of the plaintiff upon which judgment was entered and the defendant has appealed.

The accident occurred about 4 o'clock, P.M. on May 30, 1943, on U. S. Route 66 in Will County at a point where it is crossed by a county aid black top highway known as Caton Farm Road. It was raining and the pavement was wet. Route 66 runs approximately north and south and Caton Farm Road crosses it in a general easterly and westerly direction. Appellant's car, a two and one half ton Cadillac, was coming from the west on Caton Farm Road. She was driving, accompanied by her 84 year old mother, Appellee's car, a two door Chevrolet coach, was coming from the south en route to Elgin, conveying an insane prisoner from the penitentiary at Menard to the State Hospital at Elgin, having previously left another prisoner with the authorities at Champaign.

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## IN THE APPELIATE COURT UP THE BEATE OF FILLINGIS

RECOMB DISCRICT

February Term, A.D. 1945.

GUY RIDGOM,

MARITIMS.

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HATTIE JAGNER GROSTY,

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Afrent, of mon Faerial County.

Dove, J.

The just in so enterpt in sociant pass in the elecation opers of will County returned a variant of will in force of the claiminf unon thich judgment has easier dead the defendant has appealed.

The realisant occurred about 4 c'el ma, e.c. on lay or, 1943, on U. J. Coute 6: in will County as a voint where it is creased by a count, and bland tep highest 'under so then form lood. It was remains and out the product the sect. The official angroximately north and soft and daten form the desterly and west only direction. Appellant's ore, a two and one half two Ordillac, was coming from the west of Gron Franca and one half two Ordillac, was coming from the west driving, accompanied by here 64 year official from the Appellee's ore, a two door Chevrolet couch, was coming from the south en route to Elgin, conveying on insane prisoner from the penitentiary at Memard to the State Hospital at light, maving previously left another prisoner with the authorities at Champaign.

Appellee was captain of the guards at the penitentiary. The car was being driven by his friend Raymond Coleman, who lives at Chester, near Menard, and who came on the trip in order to visit some relatives in Chicago. Appellee sat on his right in the front seat and the prisoner occupied the rear seat. The collision occurred about the middle of the intersection of the two highways. Mr. Coleman testified that appellant's car smashed directly into the center of appellee's car, taking the left hand door off, and that he was thrown from the car. After the collision the car he was driving came to a stop about 70 to 80 feet north of the intersection and about 3 feet off the east side of the pavement. The front end of appellant's car was mashed, the frame bent to the left, and when it stopped it was headed west on the north side of Caton Farm Road, with the rear end still on the pavement on Route 66. Appellee was severely injured. Two ribs were broken, he was bleeding at the mouth, suffered numerous contusions, was in a confused condition, and was taken to a hospital, where he remained about ten days. Medical testimony is to the effect that he was suffering from concussion of the brain, and that he was permanently injured as a result of this collision. The repairs to his car cost \$473.21, and his hespital and doctor bills amounted to \$253.00. Appellant's oar was so badly injured that no repairs were made and it was junked.

The grounds urged for reversal are that the court erred in giving instructions on behalf of appellee, in admitting testimony of a non-expert witness as to the mental and physical condition of appellee after the accident, that the verdict is against the manifest weight of the evidence, and is excessive in amount.

The testimony as to what happened just before and at the time of the collision is in conflict, and in such case it is essential that the jury be properly instructed. Instruction 7, given at appellee's instance, told the jury that "if you believe from a

Appelled was daptain of the goards at the centientiary. The cer was being driven by his friend Raymond Coleman, who lives at Chester, near Meneral, and who came on the Will in owner to visit some relatives to Chicego. Appulles set un its right as the front seat and the prisoner prepied the scap seat. . . . politising occurred about the missile of the intersection of the two higher ye. Mr. Goleman testified and about tent's est anached director into the center of appoller's der, taking the left best cos off, and thet ne was thrown first the onr. After the oclaimer the car he not driving came to a whop about 70 to 81 neet north of one inversection and about 3 feet off to seet aide of the revenant. The frent and of appallant's ear way along the disher that we had we had the it stopy at iv the liberard note in the Albert e of level Farm load, with the rear end oill on de province of oute of. As ther was severely injured. Two oibs were broken, he was blacking of the mouth, suffered dumarous contusions, was in a confused configuran. and wes taken to a horrivel, there he are wined about tem days. Medical testimony in to file culect them to was suffering from concussion of the break, and thet to vas even acatly injured as a result of this collision. The regains to its for cost (478.21, and the targiter task door and door and door as the transfer and car was so badly injured the entry reaches the unit of the junked.

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The testinony as to what happened just before an et the time of the scalleion is a conflict, and is such case it is essential that the jury be properly instructed. Instruction 7, given at appellec's instance, told the jury that "if you believe from a

preponderance of the evidence that the accident in question and resultant injuries to Guy Rigdon if shown by a preponderance of the evidence, were caused by the negligence of the Defendant, Hattie Wagner Crosby, as alleged in the Complaint or some count thereof, and that Guy Rigdon himself was in the exercise of ordinary care for his own safety at and before the time of the injury, then you should find the Defendant guilty.

Where the owner of a car is riding in it, he has not only the right to possession of it but has such possession and he necessarily retains the power and the right of controlling the manner in which it is being driven unless it is shown that he has contracted away or abandoned that right. He likewise has the duty to control the driver. (Palmer v. Miller, 380 Ill. 256, 260). question of ordinary care on the part of the driver of appellee's car, as well as appellee's own ordinary care, was thus an element of appellee's right to recover. A fatal objection to the 7th instruction, urged by appellant, is that it disregards the element of ordinary care on the part of the driver of appellee's car, and directs a verdict. While an instruction which does not direct a verdict may be cured by other instructions when all of them are considered together as a series, (Chicago City Railway Co. v. Mead, 206 Ill. 174; Chicago Union Traction Co. v. Hawthorn, 211 Ill. 367), it is well settled that where an instruction directs a verdict, all the elements necessary to sustain such a verdict must be contained in the instruction and if such an instruction omits an element necessary for recovery it is not cured by other given instructions and the giving of such an instruction constitutes reversible error. (Hanson v. Trust Company of Chicago, 380 Ill. 194, 197: Illinois Iron and Metal Co. v. Weber, 196 Ill. 526, 531; Chicago and Alton Railroad Co. v. Kuckkuck, 197 Ill. 304; Cantwell v. Harding, 249 Ill. 354, 358; Cromer v. Borders Coal Co., 246 Ill.

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451, 457).

Appellant also complains that the instruction is bad because it refers the jury to the allegations of the complaint. Such references to the complaint have been repeatedly criticised by our courts of review, but are generally held not reversible error where the complaint states a complete cause of action, but if the instruction is peremptory and the complaint omits a necessary element of the cause of action, the giving of the instruction is reversible error. (Krieger v. Aurora, Elgin and Chicago Railroad Co., 242 Ill. 544, 551.) In the instant case while the abstract does not disclose whether the complaint alleges that the driver of appellee's car was in the exercise of due care and caution at the time and place of the collision, an examination of the record shows that appropriate allegations in this regard are made. Comphaint is also made that this instruction assumes that the plaintiff was injured. As the judgment must be reversed and the cause remanded for a new trial on account of the error first above mentioned, the parties upon such retrial will have an opportunity to have the jury correctly instructed and further consideration of this contention is unnecessary.

The 8th and the 9th given instructions are peremptory in their nature and are subject to the same fatal objection as the 7th instruction. The 9th instruction is also subject to the further objection that it does not limit the damages to those alleged in the complaint. (Chandler v. Gifford, 223 Ill. App. 486).

The 4th given instruction is subject to the objection that the jury could understand from it that appellee's car had the right of way at the intersection, regardless of the relative distances of the two cars from it, and their respective speeds. (Partridge v. Enterprise Transfer Co., 307 Ill. App. 386).

The 1st, 3rd, 5th and 10th given instructions omit proper elements, unnecessary to be detailed here, as they can be corrected on a new trial. The 5th instruction also tells the jury that they

451, 487).

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The lat, Ord, 5th and 19th given instructions cuit ocuper elements, armacherup to be detailed her. Te she, can to consected on a new trial. The 6th instruction dues calls the jury that they

"should" take into consideration certain elements. A better usage is that they "may" do so. (Rudin v. Wheelock, 249 Ill. App. 249).

Appellant also claims that the trial court erred in admitting the testimony of Mr. Coleman, a non-expert witness as to appellee's mental and physical condition after the accident. The witness testified that he had known appellee for ten years prior to the accident and had lived at his home about six years just before the accident happened; that his physical condition was "all right" and he was healthy and strong before the accident; that in the accident he was "knocked out" and was in a dazed condition which lasted until he was taken to the hospital; that "There is a difference in his condition as to what it was before the accident. He just doesn't seem the same as he used to be. Isn't as cheerful and friendly as he used to be. I can notice a difference in his mind and memory. He doesn't seem to remember things as good as he used to. " He further testified that he had seen appellee every few days since the accident up until the time of the trial which occurred on January 31, 1945.

It is well settled that before a non-expert witness is entitled to express an opinion as to the mental capacity of another person he must state sufficient facts and circumstances upon which to base it. The question of whether the facts stated form a sufficient basis for such an opinion is one for the trial court to determine, and unless the court has abused the discretion, the admission of such testimony will not effect a reversal.

(Catt v. Robins, 305 Ill. 76, 82: Ergang v. Amderson, 378 Ill. 312, 316). Long and intimate acquaintance and opportunity to observe the person whose mental capacity is the subject of inquiry is sufficient to permit the expression of an opinion as

"should" take into wonelderation certain elements. A better usage is that they "mey" do so. (Rudin v. Wheelook, 269 Ill. App. 249).

Appellant also deite that bue tried court errad in admitting the testimony of ki. Coleman - nonespect withsels as to some eller's montal and abstract or add on elem the recident. The witness tootified that he was as a collector tem years entroy the turnes assor all to bey'll but but the door and of toing just before the recident important; that his invaluate addition giaenkoud and som the garante both williams. Appren into him his in 112° one that in the spointiful we will himbelied but and the in a larged condition walled larged wall's be true without an about that erolod est di dalt to at middilato the al sonorellia a ai sredu The additions. He just the cold to be a tree from the front to be. Isn't as choordel and fire of proportion to be. I say to los a difference in his mini had record. In december to remember first our third fail which wants in the First boom but on hung the annual emil wit fitte on the loop wit each that we'r yours relieges moes of the trial a link oceated an Journal of Links and in

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(Catt v. Wobins, 300 III. 70, 88: dryung v. Anterway, 370 III. 70, 88: dryung v. Anterway, 370 III. 70, 88: dryung v. Anterway, 370 III. 316). Long and inches coquains and opportunity to observe the person whose normal expensive is the subject of inquiry is sufficient to persit the expression of an opinion as

to his mental capacity by a non-expert witness who states sufficient facts upon which to base such opinion, the weight of the testimony being a question for the jury. (Chicago Union Traction Co. v. Lawrence, 211 Ill. 373; Britt v. Darnell, 315 Ill. 385, 401; Peters v. Peters, 376 Ill. 237, 242, 243; Ergang v. Anderson, 378 Ill. 312). The facts upon which the witness based his opinion were his long, intimate acquaintance with appellee, his frequent contacts with him since the accident, his impaired memory and the difference in his disposition. The plaintiff testified, without objection, to his impaired memory, and Dr. Rooney, who attended him while he was in the hospital, testified that the injury to his brain will and apparently had caused some disturbance in his memory. Dr. Kuhlman, his physician since he left the hospital, testified that he administered phenobarbital in order to make him rest a little better, reduce nervousness, and make him less irritable. We do not think that the error, if any, in admitting the testimony of Mr. Coleman, was prejudicial.

It is unnecessary to pass upon the claims that the verdict is against the manifest weight of the evidence, and that it is excessive. For the errors referred to the judgment of the trial court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

to his mental capacity by a non-expert witness who etsies sufficient facts apon which to base such opinion, the weight of the testinony being a question for the jury. (Chicago Union Traction Co. v. Lawrence, 211 Ill. 375: Britt v. Pornell. 515 Ill. 385, 401; Peters v. Peters, 576 Ill. 057, 242, 245; Ermann v. Anderson, 578 Ill. Just. The facts upon which the winners based his opinion were his long, into ate appualmonne with conelles, his frequent contacts with him winder the accordant, his important memory and the difference in his disposition. In plaintiff testified, without objection, to the inches manery, and Dr. Roomey, who ettended him wills he was in the itel, at tiffed that the injury to all busin will and appropriate per owned some disturbance in ris memory. Or. Wahling, his byvicter ulace he left the Norvital, tertified to t bu suministing that the beridge in order to sake him meet a listle butter, reduce natvucaness, end make his loss irritable. 'e do out o'ina idea top error, if say, in samificing the terminary of in. Johnson, was prejudicial.

It is unnecessary to rest enon the elect the the the the tree was the verdict is suping the manifest each to the evidence, and that it is excessive. For the expense melarced to the judgment of the trial court is neversed and the dence is remarked for a new trial.

Reversed and beareves.

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GENO NO. 10063

AGENDA NO. 5

## IN THE APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1946.

2772

O. A. BROCK,

PLAINTIFF APPELLANT.

v.

GUY DERRY,

DEFENDANT-APPELLEE.

323 I.A. 400

APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY

Dove, J.

This cause is here by an appeal from a decree of the circuit court of Peoria County, dismissing for want of equity a complaint in a suit by appellant against appellee for specific performance of a written option executed by appellee's grantor, granting appellant an option for a lease of 160 acres of marsh land in Marshall County for the official duck hunting season of 1944.

Appellant had leased the premises from the owner for the duck hunting season each year from 1936 to 1943 inclusive, the general procedure being to take an option each year for the next duck hunting season. His lease for the 1943 season was preceded by such an option. On October 6, 1943, he procured a written option from Georgiana Y. Falmer, also known as Georgiana Y. Palmer Brown, the owner, for such a lease for the official duck hunting season of 1944, paying her \$30.00 therefor. This option providing for a rental of \$475.00 less the \$30.00 paid in the event the option was exercised. The option provided that it shall be binding

GENO NO. 10063

AGENDA NO. 5

## IN THE SEPLECTE COURT OF THE RESET OF THEFFOR

TOIR JU CH DES

FEBALURY TIME, A. D. 1948.

O. A. BROCK,

Piaí hetyem de kilane,

GUY DEHAY,

A.P.LAL PR. THE DIRT TV CHUR OF PLUMBA COMMIN

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full cause is dura by an appeal from a decree of the direct court of Peorla Juda () of allesing for ant of equity a complaint in a sait by appeal and a grant appeal for specific performence of a written option smeared by a puller's printer, granting appealant on a joinn for a least of less of less of assent land in furnishall downty for the afficient and a wing season of land.

Appealant had leased the precises from enter for the duck hunting season case year from 1936 to 11-55 inclusive, the general procedure being to take an option each year for the next duck nunting season. His lease for the 1945 season was preceded by such an option. On October 5, 1945, he procured a written option from Georgiana Y. Palmer, also known as Georgiana Y. Palmer Brown, the owner, for such a lesse for the official duck hunting season of 1944, paying her 330.00 therefor. This option providing for a rental of 1975.00 less the \$30.00 paid in the event the option was exercised. The option provided that it shall be binding option was exercised. The option provided that it shall be binding

upon the executors, administrators and assigns of the parties.

On January 20, 1944, appellee procured a written lease of the premises from the owner for two years from the date thereof, for a cash rental of \$1700.00 and this lease was recorded on January 21, 1944. The option of appellant was recorded on March 11, 1944. On May 6, 1944, appellee took title to the premises by a warranty deed from the owner, and the deed was recorded on May 8, 1944. Other sportsmen were associated with both appellant and appellee, and interested in the respective leases.

On June 8, 1944 appellant caused to be served on appellee a written notice of his election to exercise his option, with a demand for a lease conformable therewith, and a tender of \$445.00 as the balance of the ment. The constable who served the notice testified that appellee said, with profane expletives, that he had paid several thousand dollars for the property, and to tell Brock that if he caught him up there, he (Derry) would be up there with a shot gun.

The complaint, filed the next day, seeks specific performance of the option and such other relief as shall seem meet.

Mrs. Palmer, the former owner, was not made a party to the suit.

After an answer and reply thereto were filed the cause was referred to the master in chancery on September 11, 1944 and hearings before him were concluded on October 4, 1944. Thereafter, on Nowember 24, 1944, appellant filed, without any leave of court, and without notice to appellee, a written instrument, designated as "Plaintiff's election as to Performance" reciting the proceedings up to that time in chronological order, stating that the official duck hunting season of 1944 began on October 14, 1944 and would expire on January 1, 1945; that due to no fault of appellant it had become impossible for appellee to perform hissobligation in accordance with the strict letter of the option; that by reason thereof

upon the executors, administrators and assigns of the parties.

On January SC, 1944, appelles procured a written lease of the procures from one owner for two years from the uste then eaf, for a cash rental of \$1700.00 and this lease was recorded on January S1, 1044. The option of specifies was recorded on the object to the presides by 11, 1844. On May 5, 1944, appelles wook title to the presides by a warrent, deed from the owner, and the deed rather or led on May 8, 1944. Other stortement were associated of for expellent and appelles, and i the reserve it is not reserve of the reserve.

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After an answer and erly thereto were thied the tead, was referred to the meater in chancemy on depterors in, is, and well-browinge before the were concluded on October i, 194. The efter, or exercer say, 1944, appellant filled, atticut any leave of court, and willout filled, atticut any leave of court, and willout filled to appellee, a weighter in measure of court, and willoutiff's election as to berinnance rothing the proceedings up to the time in chronological order, stowing the proceedings up to the tark time in chronological order, stowing the dark woull outline and annuary 1, 1945; thet due to no Catob will of appellant it had become impossible for appellee to perfore his adjection in accordance with the strict letter of the opison; that by reason that each

appellant had the right at his election, in case the issues were found in his favor, to accept damages for non-performance or accept such part performance or slightly different performance as appellee is able to make with or without an abatement of the stipulated amount of rent or damages for deficiency of performance; and electing to accept a lease for the official duck hunting season of 1945, in lieu of the lease specified in the option, without any abatement of rent or damages for deficiency of performance, as a full, complete and satisfactory performance on behalf of appellee under the option.

The master's report, filed January 24, 1945, recommended a decree in conformity with appellant's election. Appellee's 7th exception to the report, that the master erroneously found that the deed to appellee caused a merger of the leasehold and the fee, and that appellee could not rely upon his right of possession under his lease, was overruled. All of appellee's other exceptions to the report were sustained, and the decree appealed from was entered.

The notice of appeal, filed August 7, 1945, asks a reversal and remandment, with directions to enter a decree directing appellee to perform the option as nearly as possible by executing and delivering to appellant a lease of the premises for the official duck hunting season next following the entry of such decree, which appellant agrees to accept as a substantial and satisfactory performance of the contract without any abatement of rent or damages for deficiency ofperformance; or, awarding appellant damages in the event of a determination that equity is now without jurisdiction to enforce such substantial performance, and for other and further relief in the premises as equity may require. The same relief is urged in appellant's statement of errors relied upon for reversal.

The evidence discloses that the land in controversy is in the vicinity of Peoria, on the Illinois River. Appellee

appellant had the right at his elaction, in case the issues were found in his favor, to accept damages for non-performance or accept such part performance or alightly different certormance as appelles is able to make with or rithout an ebatement of the stipulated amount of rent or damages for deficiency of performance; and electing to accept a lease for the official dask indias selection of 1945, in lieu of the lease appoified in the obtion, without any abswement of rent or damages for deficiency of performance, as a full, complete and savisfactory performance a beside of appelled under the option.

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The routes of sepsel, filed ad use in 10,10,0, seke there versal one remandment, where there is a setale be executing appelles to perform the content as setale by executing and delivering to appellent a losse of the creating that he seeked that of the creating that he with appellent agrees to coepy as a substantial and estimated or the contrast of theory performence of the contrast without sug abetement of rent or damages for deficiency dispersions; or, awarding appellent damages in the event of a determination that equity is now without the jurisdiction to enforce such substantial performance, and for other and further relief in the premises as equity any require. The case relief is urged in appellant's attacement of empone relief and upon for reversal.

The evidence discloses that the land in controversy is in the visinity of Peorla, on the Illinois River. Appellee

had hunted ducks along the river for 25 or 50 years. He was a game warden for 6 years, and during that time had visited practically all the hunting grounds along the river near Peoria. He testified that he had been acquainted with the land in question since 1933. but until January 1944 had not been on it since the death of Mrs. Palmer's husband. The lease to appellee contains a covenant that the lessor has the absolute right to lease the premises; that the lessee shall have the right to possession free and clear of the rights of all other persons; that the lessor is in sole possession. and that there are no outstanding leases. Appellee testified that he and his attorney who repared the lease checked the records and found no prior lease or option. His attorney testified that Mrs. Palmer said the land had been rented for the duck season only, that she was back in possession, that she had never rented it for more than the duck season and so rented it every year. Appellee and his attorney each testified that when appellee's lease was entered into Mrs. Palmer told them there was nothing outstanding against the property. Appellee also testified that at that time he knew the land had been used for duck hunting each year for a number of years, but did not know or have any information that anybody else had any rights in the land. It also appears that Mrs. Palmer also owned the 80 acres across the road south of the land in controversy and appellee and his attorney both testified that she showed them a lease or an option for a lease on this 80 acres and told them it was the only one that had ever been outstanding.

The testimony shows that from the latter part of January or the first part of February, 1944 up to the time of the trial, appellee and his associates were in active possession of the premises, making extensive repairs and improvements, going there at least two days a week or oftener. A large part of the land is under water all the time, Nobody lives on the property, and the only fence on it is along the ease side. There is a roadway along

had hunted ducks along the river for 25 or 50 years. He was a came warden for 6 years, and during that they bod visited practically all the number grounds along the river mear Protic. To restriced that he had been moduainted with it withd in weestion since 1935. but until January 1944 had not been on it since the neeth of Mrs. Palmer's 'unspand. The lanse to a unlike char ins a consumnt that the lesson has the absolute right to lesse the periods; that the and the color of the color of the colorest of the color of the color of the rights of all other tarsons; that the lease is let in our coursenon, Just Partie 4 and 1 - A . . Preading Marktain or ere early that Bars inde abover and I. Wheek easel ald Ferener toth years for the and has an found no rise lesse of the site aborder for the line. Palmar said was lin' ask over asmost for it for the cally, tol ti better more in the second and the second terms in the second to the second terms of more than the dock sough and so rested it dvire fourt arreline and his attender and tentified for when appelle 's love even entered into Ers. Palmer toll of sections and notific our standing agains whe property. Appelled the to the the contract was the kind the limb bed been used for hund with the tone of the number of years, but tid southing at how one of continue that anybody sign bol any eights in the the little of the transfer Mys. Palmen also owned the 60 cores cover the contract of the land in controvers, who spoulder in the interest which testified that she showed them a lease or an option for a face or this 30 cores and tolk them in the the cult and that her as a let . Autetable a.

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the south side, and a cabin, or club house, a short distance from the road, near the center of the south line.

It appears from the testimony of appellant that he and his associates had blasted out some ponds, and a ditch leading to a dike of a drainage district running across the northeast corner of the land, in order to get boats onto dry land, with a landing of planks and a boat rack at the dike, several hundred yards north of the southeast corner of the property. They had placed four duck blinds, made of bull grass tied or wired to uprights driven into the ground below water in a pond on the north part of the property, where they did their shooting. These had to be renewed each year. There is timber between the road on the south and the shooting pond. The land is also overgrown with brush and bullrushes, and it is impossible to see any part of the pond or the boars from the road, but to do so, one would have to walk up the dike on the east side something less than one-half mile, and then west about 190 yards to the boxt landing. There was a path along that route, leading from the cabin, with a foot bridge.

Under the terms of appellant's lease, Mrs. Palmer was to furnish three boats and not less than five dozen decoys. Appellant testified that she furnished two boats, and that another boat was furnished by him or his associates, and that they were left at the dike at the close of the hunting season about December 21, 1943; that the lessor's decoys, and the oars, push paddles, some gasoline drums and lamps, kerosene cans, two wooden lockers, cooking utensils, aprons and towels belonging to him and his associates, were stored in the club house between hunting seasons, appellant and the lessor each having a key. Appellee testified that Mrs. Palmer did not tell him that appellant had a key. After the 1942 hunting season, appellant and his associates had made some repairs to the club house, some of which were paid for by Mrs.

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Palmer. The lease provided that she should maintain it,
its contents and the outbuildings in "present usable condition."

Appellee further testified that on about January 10, 1944, he took Mrs. Palmer out there with the purpose of looking at the 80 acres, and went over it; that he did not ask her, and she did not say anything about who had been hunting on the land here involved, and that she said she was going to keep it for herself, and said nothing about appellant having hunted on it, or about his having a lease for the next year; that he went back later alone and looked over the 80 acres again, as he was anticipating buying it, but made no inspection of the 160 acres, having seen it several years before and knowing what kind of land it was.

Louis Poignant, who lived about a half mile from the land and kept the boats at his place between seasons, fixed the date that appellee and Mrs. Palmer came out to the land as January 12, or 13, 1944. He testified that on that occasion he and appellee went over the 80 acres, and then came back to the cabin, Mrs. Palmer remaining in the car; and that he did not remember anything he had done in the cabin. Some discussion was had between him and Mrs. Palmer about hauling boats out to his place, and she directed him to haul a boat which appellee testified was along the roadside, and which she claimed was hers, but which afterward turned out to belong to a Mr. Droll, a watchman for one of appellant's associates.

Until January 21, 1944, the day that appellee recorded his lease, he and appellant were strangers to each other. On that day appellant came out to the premises to look for Mr. Droll's property, unlocked the cabin, went in and looked around, and then went on to the boat landing. On his return he found appellee and another gentleman coming out of the cabin, and asked appellee who he was and what he was doing in the cabin, to which appellee replied that Mrs. Palmer had given him the key and he was looking

Palmer. The lease provided that she should maintain it, its contents and the outbuildings in "present usable condition."

Appellee further testified that an about Jennemy 10, 1944, he wook Mrs. Palmer out there with the purpose of Loking at the 80 sores, and went over it: that he did not say anything about who had been lanting on the land here involved, and that six only she was notice to been in the for here involved, and tatt six only she wouldn't be notice to been it for hereaff, and waid notifing about secoliant is any annead on it, or about his having a lease for the next year; that at went back later alone and looked over the Scharce arcin, a be was notice ipating buying in, but wade no inepection of the 15 outer, having seen is several years before and inoving what him the several years before and inoving what hind of land it was.

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Until Jenuary 11, 1964, the day that excelled recorded his lesse, he and appellant were strongers to each other. On that day appellant case out to the precises to look for Mr. Droll's property, unlooked the cabin, went in and looked round, and then went on to the boot leming. On his rather be found appellee and another gentleman coming out of the cabin, and asked appellee who he was and what he was doing in the cabin, to which appellee replied that Mrs. Palmer had given him the key and he was looking

things over for her. He testified that he "was a little on guard" as he did not know appellant. That appellant told him that he had shot ducks on the property and intended to do so and that he had an option on it for the 1944 season from which appellee concluded that something was wrong, and said nothing about having a lease on the premises. He showed appellant the push paddles and appellant put them under the cabin where Mr. Droll could get them.

It is insisted by appellant that the master's findings should not be disturted unless clearly contrary to the manifest wight of the evidence is untenable. In courts of review that doctrine is applicable to findings of fact only where the master's report is approved by the chancellor, (Mruk v. Mruk, 379 Ill. 394, 401), or where the court has heard the evidence. It is not applicable where the court did not hear the testimony. The findings of the master are only advisory and are open for consideration by the chancellor and by a court of review. (Jones v. Keepke, 387 Ill. 97, 107).

The election filed by appellant to accept a lease in lieu of the lease specified in the option without abatement of rent or damages for deficiency in performance, as a full, complete and satisfactory performance on behalf of appellee under the option, was a waiver of any claim for damages on account of non-performance and the answer to his contention that appellee's 7th exception to the master's report recognized his right to claim damages if the issues are found in his favor is, that the election was not filed by leave of court or was appellee ever apprised thereof prior to the filing of his exceptions to the master's report. Appellant took the initiative in the proceedings, and equity requires that appellee should have been informed of the filing of the election before he, appellee, could be estopped by his exceptions to claim that appellant had waived any claim for damages.

As to the question of the merger of appellee's lease by the taking of the deed, the general rule is that when the tenant's tidings over for her. He lestified to the employed on guard" self that no six that the last tells in that he is the day's and the composity and inconsected to do no and that he had an eptime on it for the the except flat within appointed composition on it for the last consection was about self that content in acting a cluded that content is a very down that it is a very down that the content is a very down

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As to the deed, the person of the merger of the least by the totant a

estate and the reversion come together in him, there is a merger, but there are well defined and long established exceptions to the general rule. In equity, the intention and interest of the party who unites the two estates in himself, will determine whether or not a merger takes place, and to effect a merger the right previously held and the right subsequently acquired must coalesce in the same person, without any other right intervening. (Hooper v. Goldstein, 336 Ill. 125, 132-133; Richardson v. Hockenhull, 85 Ill. 124: Huebsch v. Scheel, 81 Ill. 281: Edgerton v. Young, 43 Ill. 464: Campbell v. Carter, 14 Ill. 286: Tiffany, Landlord and Tenant, Vol. 1, pp. 68-89). Appellee did not take a deed to the premises until after appellant had informed him of the existence of his otpion and after the option was recorded. Manifestly, when he had both actual and constructive notice of the option and is presumed to have known the law, he would not intend and it would not be to his interest to merge his leasehold into the fee by the deed when he knew that the deed would be subject to the option, which was an intervening right. Under the exceptions to the general rule, there was no merger. Cases under the general rule, relied upon by appellant, are not in point. Appellee was entitled to rely upon his lease. The claim that what he told the constable, when served with notice of appellant's election to exercise the otpion that he had paid several thousand dollars for the land was a waiver of his right to rely upon the lease, and that he thereby elected to rely only upon the deed, is without merit. There is nothing in that statement to indicate that he thereby intended to waive or abandon his rights under the lease.

Upon an examination of the testimony, we are unable to say that it discloses any willful or negligent closing of appellee's eyes to facts which would have given him notice of appellant's option, or which should have put him upon further inquiry. He and his attorney searched the records, interrogated the lessor as to the

estate and the reversion come together in him, there is a career, but there are well defined and long estublished exceptions to the general rule. In equity, time intention and interest of the panty who united the two estates in a realf, will determine whicher or not a marger takes riseo, and to offer a weser the other encelsic from It the as glandranders dugit ent the bled glandrence in the same newson, whilen't ser of ser which her weather. (Mooper v. Goldstein, 756 171. 135, 132-134; Stennicks . Toeknolmini. 35 111. 184; Bunhach . . of col., Cl I.I. 2010 Idents on v. Young 45 Ill. 466; Ormobil t. Striker. 14 Wil. 208; Tiffing Landrerd and Tement, Vol. 1, on. 38-29). April 11n. di continuis i Seel to limi in contract of the after or ellest but informed the of the enforcement to his otation and after the ordinartee reporded. In intention when an -arr at him without out to estion awither that her Louis add Ded sumed to have largen in leve ter, he would be indeed and his world not be to his interest to serve its issessibilitate this for or local cost dother produce of the form and blow wheele add tonic word and name was or invervening sight. This work the state is the conerci relegi there was in serger. Forces on ear the conversionality is like unounly appellant, are not in moint. Armelles o a entitle to the whom his lease. The chair that that the bold of desire the termed with notice of spellant's election is seemile the or has that To merica a three including of recollet or sunciv forever bige bad ed his right to rely upon the Peace, as the theoreby clasted to rely unon the dead, is without north. There is the any in that acctement to indicate the to themself intended to raive or abondon his mights under the locate.

Upon an exemination of the receivance are unable to say that it disables any militud or negative closing of appellects eyes to feets which would have given him neather of application or which should have put him upon further inquiry. He sad his atterney searched the records, interrespied the lessor as to the

rights of anybody else in the property and were told by her that the land had been rented for the duck season only, that she was back in possession and that there was nothing outstanding against Her assurance went so far as to show them a lease or an option on the 80 acres, with the statement that it was the only lease or option which was ever outstanding. She had a key to the club house, and was apparently in sole possession, and appellee did not know that appellant had a key. As to the articles left in the club house, it is not shown or claimed that there was any general custom of sportsmen in that respect, and the fact that appellant did so does not establish such a custom as would be notice to appellee of his rights thereunder, if any. (Bissell v. Ryan, 23 Ill. 566; Kelly v. Carroll, 223 Ill. App. 314). Appellant recognized Mrs. Palmer's right to have a key, and she was as much in possession as he. Where the record owner of property is in possession of property, and a second party is likewise in possession, the possession of the latter is not notice to purchasers or judgment creditors of rights which such person may daim in the premises by his possession, but his possession, in order to be such notice, must be exclusive and unequivocal. (Union Bank of Chicago v. Gallup, 317 Ill. 184, 189: Gray v. Lamb, 207 Ill. 258). Furthermore, the character of the articles left in the club house was such that appellee might well assume that those of any consequence belonged to the premises, and that the others had been abandoned by the former lessee.

While appellant and his associates had blasted out a pond and ditch and installed a wooden boat landing and boat rack, there is no showing or claim that they were installed except for use in the seasons when they were actually used, and no claim is made that they did not belong to the lessor. After the expiration of the hunting season their mere presence would not indicate to

rights of anybody else in the property and were told by hor that the land had been rented for the duck sesson only, that she was dealings religionated in a district one entity in the acceptation in social it. Her assumance went so for this elect than a large or an option on the 30 reres, which the restance that it was the enly lease or optin which was ever outstaride. The half of the third has known, and was arranging in sole . Carrier, me are in like did not not suow that come linet had a vey. We can be subject that from the Louges, it is not shown by oleking the first of the tree that and a lougest ouston of evertsmen in instructions the test the test of the did so does not esteldineb and of our entrol of notice to appelles of his wights therebery lister. Witsell v. Terr. 111, 866; Mc115 v. Osrmell, 1 0 111. 1 1. 1971. ... all the recommined Wro. Palmer's of his no hove which is at a common recommend the state of in more section see he. There will constitute of constitution of a , wo isconnon and soft office and other from the form three own the gradue gases transmission of the state of th gri alegiment. Ai mi similing, maulo, hada deina oddain io emodičeno his mossesulyns, but his consequent of an arm of a confidence must be explasive and unredirection in ion Bariner Files o v. Sellur, 517 Ill. 184, 206: over t. U. b. 197 181. . oth. Frathermo.s, the character of the sufficient of the last the summer of the Describe acresses. The Solem is and a great line togic enligance to the premings, and that the others had been of abone of the former leasee.

While appealant and its responsives had blooded out is pond and distance on installed a roller back leading and best week, there is no showing or alaim that they wore in the ceasons when they more obtailly used, and no alaim is made that they did not belong to the lesson. After the expiration of the bunting season their mere presence would not indicate to

appellee anything more than that sort of a situation and the grass on the duck blinds, which had to be renewed each hunting season, had served its purpose for the 1943 season.

Appellant cites and relies upon the case of Gustin v. Barnye. 250 Ill. App. 209. In that case it appeared that while an unrecorded lease was in force, the lessor conveyed the premises by deed during the hunting season of 1925. The evidence disclosed that there were on the premises three blinds of cut willows, three circular feeding pens, inclosed by 150 feet of chicken wire 5 feet high, attached to poles stuck in the ground, each containing a raft or float upon which was a box of feed for live call ducks, with approximately 25 live call ducks in each pen, and there were "no Trespassing signs with the lessee's name thereon posted on trees and stumps, clearly showing the lessee's possession and the court held that these were sufficient notice of his rights. That case is not applicable here, where it appears that the lease to appellee was made after the close of the hunting season, and the physical conditions did not indicate that anybody else was in possession or had an option for another lease. We are unable to say that there was anything apparent to appellee, or that he could have been charged with seeing by further examination of the premises, that would have discredited Mrs. Palmer's assurances to him and his attorney, or that would have prompted or necessitated further inquiry.

When appellee was accosted by appellant at the premises on January 21, 1944, they were strangers to each other, and the fact that appellee did not disclose his lease at that time to appellant, who asserted he had an option for the next hunting season, does not in the light of appellee's testimony that he knew something was wrong and was on his guard, militate against his good faith in having procured the lease. If he had had any knowledge of appellant's rights and had sought to supplant him, it is reasonable to think that he would have procured his lease immediately after his trip out there about January 10th, but he did not do so until

appellee anything more than that sort of a situation and the grass on the duck blinds, which and to be renewed each hunting season, had served its purpose for the 1943 season.

Appellent siter and relies woon the seas of Ogetin v. Bannye, 850 Ill. App. 909. In that case it cupesyed that while an unmoderded lesso wee in force, the losser corvered the premises by deed Auring the languagener of 1985. The wideres disclosed that there were on the predicted these blinds of our willows, three diroular fooding ness, inclosed by 150 foot of citoken wind 8 feat high, attached to poles stuck to the ground, each containing a raft or float upon which wee a box of feed for line call duaks, with approximately 25 live call ducks in each sem, and there were approximately Prespacaing a signs with the leaser's asme therees posted on trees and stunns, clearly shouths the lesses poosession mustice court hold that thede were sufficient notice of his mights. That case is not spoliacable have, where it appears that the lease to appalled west made ofter the close of the hunting secson, and the physical conditions did not indicate that enghedy else are in cossession or had an option for another lesse. It are maken to eas that there was shything apparent to appoiled or that is sould have been charged with seeing by dirition end investor of the ore inter, that would have disgredited Mrs. Palmer's assurences to the old his ottorney. Or that would have promoted or necessitated statisher invains.

When appelles was eccested by speellent at the premises on January 21, 1844, they were strangers to each other, and the fact that appelles did not traclose into become at the bilas to appellent, who asserted he had on option for the next hunting season, does not in the light of appelles's testimony that he knew something was wrong and was on his guard, militate against the good faith in having procured the lease. If he had had any knowledge of appellant's rights and had sought to supplant him, it is reasonable to think that he would have procured his lease immediately after his trip out there about January 10th, but he did not do so until

the 20th of that month. Our conclusion is that both parties acted in good faith in their dealings with Mrs. Palmer, and the circumstances were not such as would put appellee upon notice of appellant's rights before he procured his lease. So far as the record shows, Mrs. Palmer was an available witness for either party. Neither of the parties called her to testify. No legal effect, however, can be deduced from this fact helpful to one or disparaging of the other simply because he did not produce her as a witness.

Appellee recorded his lease on January 21, 1944, the day after it was obtained and he went into actual possession almost immediately thereafter. Although appellant obtained his option on October 6, 1943, he did not record it until March 11, 1944, more than a month after appellee was in actual and notorious possession of the leased premises. It is a maxim that equity aids the vigilant, not those who alumber on their rights. Another familiar maxim is that where the equities are equal, the law will prevail, and the long established rule of law is that where there are two innocent parties, and one of them makes possible or puts into the hands of a third party the power to commit a fraud, or an act which occasions a loss, he must stand the loss.

The chancellor was correct in dismissing the complaint for want of equity and the decree appealed from will be affirmed. This conclusion dispenses with the necessity of considering other matters urged on this appeal.

Decree affirmed.

the 20th of that nonth. Our conclusion is that both parties acted in good faith in their dealings with Nor. Palace, and the circumstances were not and nord, at special comparisons of appellant's rights hefore as pooled in lease. It was the theory record shows, the frillness on avelocity is lease. It was the party. Weither of the model as of the covers of the configuration of the model as of the covers of the configuration of the covers of the configuration of the covers of

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Washington Compact

GEN. NO. 10067

Abstract

AGENDA NO. 8.

## IN THE APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1946

78

IN THE MATTER OF THE ESTATE
OF MARY PETERS, DECEASED,
WARD THOMPSON AND LAURA
THOMPSON,
Plaintiffs-Petitioners-Appellees,

v.

ESTHER A. PETERS, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARY PETERS, DEGEASED,
Respondent-Defendant,
JAMES H. PETERS,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF WHITESIDE COUNTY

3201.A. 4002

Dove, J.

This cause is here by an appeal from an order of the circuit court of Whiteside County, ordering the executor of the estate of Mary Peters, deceased, to pay appellees the share of her son, James H. Peters, in the estate, under a written assignment of his prospective interest therein made during the decedent's lifetime, to Steve White, now deceased, whose executor in turn assigned the assignment to appellees. Appellant claims that the assignment, absolute on its face, was collateral for the payment of a promissory note to White.

On October 16, 1916, James H. Peters borrowed \$800 from Steve White, evidenced by a promissory note of that date, bearing interest at 7% due one year after its date, signed by appellant James H. Peters, using the name of J. N. Peters, and bearing the purported signatures of Mary Peters and Ethel Peters. On August 14,

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AGEMBA NO. 8.

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GEN. NO. 10067

## SHY MO TRUOD STAULERSA SHY NI STATE OF TILINOIS

STEGRE DISTRICT FEBRUARY TYRM, A. D. 1946

> IN THE MATTER OF THE SETAME OF MARY TETERS, DECRESSO, MAPS THOUSDON AND LAUTE THOMPSON.

Plaintiffe-2 - tittion ers-Atjellood,

ESTHER A. LETERS, EMEDITOR LAST WILL AND THEFALTER F PETERS, DECEMBED . i nabhaireG-une bnor èa 3

JAMES H. PETERS, Defendence-Ar Silet.

Jove, J.

This cours is here by an engaged from an under of the eirouit court of dhitesico tauthy, codering the taseater of the estate of Mary Petera, decembed, to pay appellers the above of her son, James H. Teters, in the estate, under a written assignment of his prospective interest therein made buring the decedent's lifetime, to Steve White, now decemed, where executor in turn secioned the assignment to appellent. Appellent olning that the assignment, athorute on its face, was collected. It out is payment of a promissory note to White.

On October 16, 1916, James H. Leters bornowed 1800 from Steve White, evidenced by a promissory note of the black, bearing interest at 7% due one year of ter its dave, sign a by appellant James H. Peters, using the name of J. M. Peters, and bearing the purported signatures of Mary Paters and Athel Paters. On August 14, 1922, James H. Peters assigned his prospective interest in his mother's estate to White, the consideration being expressed therein as \$1.00 and other good and valuable considerations, the assignment being absolute in its terms. White retained the note in his possession and Peters made payments thereon aggregating \$370.00 the last of which was on January 27, 1928. On January 4, 1938, White started suit on the note in the circuit court of Whiteside County, and the cause was still pending when Mary Peters died on September 6, 1938 and at the time White died on July 23, 1940. The note was inventoried in White's estate, reciting \$1754.00 as the unpaid balance, with a statement of the pending suit, the pleading of Mary Peters that her name on the note was not her signature, her subsequent death, and that the "assignment aforesaid was made by said J. N. Peters to the said Steve White upon the consideration evidenced by said note."

on April 22, 1941, the executor of White's estate assigned to appelless the note and also assigned to them the said assignment of James H. Peters to White. On April 10, 1943 appelless appeared in the suit on the note and on their motion the shit was dismissed on May 3, 1943. On June 2, 1944, appelless filed their petition in the county court against the executor alone asking payment to them of the share of James H. Peters in the Mary Peters estate, as assigness thereof, and an order granting the petition was process. From which the executor appealed to the circuit court.

By leave of court, appellant, James H. Peters, filed an intervening petition in the cause and an answer and counterclaim. In these he alleged the execution of the note, the payment thereon, and claiming that the assignment was made to secure its payment as collateral only and seeking to limit the recovery of appelless to the amount due on the note,

1922, James M. Feters assigned bis prospective interest in his mother's estate to inite, the consideration foin, expressed though as \$1.00 and other coul and valuable consideration foin, the actions as \$1.00 and other coul and valuable consideration and feters in the possession and feters on the property 27. 1963. In the possession and feters on the action of the seasons, in 1963. In the last of which was on the solution of the seasons, in 1964, and the started outs on the color of the seasons, and the same and the seasons of the seasons, and the started in the seasons, and the seasons, and the seasons, and the seasons, and the seasons of the seasons, and the seasons of the seasons.

On Applil Court of the engineers end of the court fines and This is not a second to the first could be soon only applicants of Describes have the contract to the arm and the property and the second of the contract the co dismissed on way of late. The for the first of the first of the beals petition in the castry opens to the tree of the control of the payment to them of the above of dome. I. . A . . it is not properly estrae, we assigness thereif, the contract of the relation . Trusts stroker seek at brandage to broke with stoken mound WEST MEMBERS By leave of andre, appellant, Jenes in terror, itera as -reduce the reveal of the espec and of the deliter palmertaini claim. In these he allowed the excending of the note, the payment thereon, and elaining they the cast runout you sain of paideed in which bereveller in thempse att equee of limit the recovery of surelized to the enount dot on the note.

The answer of the executor was to the same effect. Upon the hearing it was stipulated that appellees are the owners of the note and the assignment, and that \$1248,53 had been paid by the executor to the appellees, representing moneys in the Mary Peters estate belonging to James H. Peters.

Appellant's claim that the order of the county court was a nullity because he was not made a party to appellee's petition in the proceeding in that court is of no consequence, inasmuch as he filed an intervening petition, an answer and a counterclaim in the circuit court on the appeal, thereby submitting his person to its jurisdiction and the cause was tried de novo.

And his other suggestions on jurisdictional questions are answered adversely to his contention in Pocahontas Mining Co.

V. Industrial Commission, 301 Ill. 462, 476; Randolph V. Ralls,

18 Ill. 29; Allen v. Belcher, 3 Gilm. 594 and Herb V. Pitcairn,

392 Ill. 138 is analagous.

When appellant's deposition was offered in evidence, it was objected to on the ground that all the testimony in it was incompetent, irrelevant and immaterial, and was an attempt to change a written instrument by oral testimony. The latter ground is urged by appellees in this court. Whether the court admitted the deposition in evidence does not appear from the record. The deposition is to the effect that appellant talked with White in 1922 about the note and that security therefor was discussed; that White said he was in no particular hurry for the money if appellant could give him some other security, and it was agreed that appellant would make the assignment, which he did; that he received no money when the assignment was made, and that the note except the payments which had been made thereon, was still unpaid.

Even if it be conceded that appellant's testimony as to the collateral character of the assignment was imcompetent on the ground urged by appellees, there is other abundant The answer of the executor was to the lower effect. For the bearing it was stipulated that empedies confide a maps of the mote and the assignment, and the mote and the assignment, and the assembler to man a collect majors and the assembler to man a collect majors and the discount of the collect and the discount of the assembler to make the domestice of the collect and the collect

Appellant's classification of the second of the entropy of the ent

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"ver if it by some of the ending the collins of the collins as important to the collineral characters on the ground urged by appelless, there is other librals.

competent testimony in the record that it was only intended to be used as collateral security for the payment of appellant's White retained the note in his possession and appellant thereafter made a payment or payments thereon as late as January 27, 1928 about five and one-half (5%) years after the assignment was made, which refutes appelleds! suggestion that appellant could probably have obtained the note at any time by asking for it. Within the limitation period of ten years, White started suit on the note, evidencing his intention to keep it alive, and this suit was still pending on May 3, 1943. this time and on April 22, 1941, appelless acquired not only the assignment to White, but also the note, and, by the stipulation, they still own it. The note was inventoried in White's estate as an asset thereof, with a statement indicating that the assignment by appellant was collateral for its payment. These circumstances clearly and sufficiently show that the assignment was intended by appellant and by White as collateral, and was treated as such by both of them and by White's executor, Appellees, as purchasers of the note and the assignment, are chargeable with notice of the payments made on the note after the assignment, and with what the records disclose as to White's suit on the note, and the statement in the inventory in his estate, indicating the collateral character It is not claimed that appellant received any of the assignment. money or enything else of value from White at the time the assignment was made, or that the consideration for the assignment was other than the unpaid portion of the debt due on the note.

Appellant's testimeny that he did not know of the payment by the executor to appelless of \$1247.58 (stipulated as being \$1248.53 was competent. His counterclaim alleges that he had never been made a party to any of the proceedings relating to the distribution of any moneys due him as an heir at law or under the will of his mother, and this allegation and his testimony on the subject is not contradicted by any evidence in the record. His

competent testimeny in the record that it was only intended to be used as collateral security for the payment of appellant's thallegg, is a mileroust, aid at over out benisses withit .etc. - as early an moreouth correspond to decembe a palar totherestive sansary 27, 1922 aban five was the fell file grant the assimment was made, walch refused by called the calless was free their THE SOURCE LEVEL OF COURSE OF A LABORATED SOURCE TRADESCORE DELICO CONTRACTOR originate the control of the control එකි. 1985ක් වන නව එට පහර කාරය පැළිදුසාමනික්වට දුමාව එය වැනිව නොක සිතියාන නිසින්වාන්මේම stive, and this cold bar this gradient at the last law marker The Jon Landerpoor that keeps and the Milliant to bus suit time the sanispront in White but thee liveness, and, let de stip alertion, they still own it. The note was invested to the are a state we an esset thorsen, with a statement twister about the course westga can by appellant was on interest in the application of the formation as ologidy ara szfileissály elek (1906 ile eszigyesi era makici by appolicate and by office or clerke d. . From to select an adult are and of the med by the o's the other, the partition, as needed we the fire of the six the of the nate and the east are the state of the Gild of the double the garden for all that cold no wome at manying roomeds absolves as to sall te mast on the sade, at the classesses in the inventory in his or a fee, inchartant tax collatered characters The audigment. . It is said the delical to the audigment and act wordy or crystian cite of value from Thise of the bus the cashing ment usus mede, or that the consideration for the area panel was other than the unmeld portler of the debt due on the sere.

Appellant's testimony that he did not annow of the ponment by the exactor or appelless of 1247.56 (stipulated as being
f1248.63 was compatent. The counterclain alleges that he had
never been ands a party to any of the proceedings relating to the
distribution of any mensys due him as an heir of low or unior the
will of his actner, and this allegation and his testimony on the
subject is not contradicted by any syldence in the record. His

mother's estate is still in processof administration, and it cannot be said from any facts in evidence that he has been guilty of laches in claiming his rights under the assignment.

character of the assignment, did not dismiss the suit on the note against appellant until they had owned both the note and the assignment approximately two years. By so doing they treated the note all that time as a subsisting enforceable obligation. Their claim that the note is now outlawed and of no value is untenable. That part of appellant's deposition that he left Illinois in 1930 and has been outside of the state since that time, was competent and his absence tolled the Statute. (Ill. Rev. St. 1945, chap. 83 Par. 19). The note therefore is an existing enforcible obligation and is so recognized by appellant and also by appellees.

It is a familiar rule that where a deed is made by a mortgagor to a mortgagee, and the mortgage debt is not satisfied, but is kept alive, the transaction is a mortgage. (Ennor v. Thompson, 46 Ill. 214, 223; Totten v. Totten, 294 Ill. 70, 79.)

The right to redeem from a pledge of personal property should not, in any event, be denied by the courts on the ground that it has been lost by laches or has been waived or abandoned by the pledgor, so long as that right is recognized by the pledges and the pledgor. (Daly v. Spiller, 222 III. 421, 425). While the instant transaction was not strictly a pledge under the meaning of that term, inasmuch as it lacked manual delivery of the subject matter, the principle involved is the same, especially so in an equitable proceeding, which characterizes this proceeding. (Thornton v. Louch, 297 III. 204, 211-212; Hudson v. Hudson, 222 III. 527, 530; Dyblie v. Dyblie, 389 III. 326, 329.)

The order of the circuit court is reversed, and the cause is remanded to that court with directions to proceed in accordance with the views herein expressed.

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GEN. NO. 10072

IN THE APPULLATE COURT OF THE

STATE OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM. A. D. 1946

PEOPLE OF THE CITY OF OTTAWA, ILLIEOIS, PETITIONERS-APPELLANTS

V.

328 I.A. 401

CITY OF OTTAWA, ILLIPOIS, A MUNICIPAL CORPORATION, DEFENDANT-APPELLED

IN THE MATTER OF PETITION, OBJECTIONS THERETO AND ANSWER THERETO CONCURRING:
"AN ORDINANCE PROVIDING FOR THE INSTALLATION OF PARKING METERS AND ESTABLISHING REGULATIONS FOR THEIR USE AND OPERATION," PASSED BY THE CITY OF OTTAWA, ILLINOIS, APRIL 2, 1945, AND APPROVED BY THE MAYOR OF SAID CITY OF OTTAWA, ILLINOIS, APRIL 3, 1945, AND FUBLISHED APRIL 11, 1945.

APPEAL FROM THE COUNTY COURTY

Dove. J.

This cause is here by an appeal from a decree of the county court of LaSalle County, sustaining objections to a petition signed by certain electors of the City of Ottawa, directed to the city clerk, demanding that an ordinance for the installation of parking meters and establishing regulations for their use and operation, passed April 2, 1945, duly approved by the mayor and published, be suspended and reconsidered by the city council, in accordance with section 19-69, and all sections pertinent thereto, of the Cities and Villages Act. (Ill. Rev. Stat. 1945, chap. 24, par. 19-69, et seq.).

Section 19-69 provides for the filing with the city clerk, within 30 days after the final passage of an ordinance such as the one in controversy, of a petition protesting against the passage of

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the ordinance, signed by electors of the municipality equal in number to at least 10% of the votes cast for mayor at the last preceding general quadrennial municipal election, the suspension of the ordinance upon the filing of such a petition, the reconsideration thereof by the council, and if not repealed, for submitting the same to a vote of the electors as provided in submetting the same to a vote of the electors as provided in submettion (b) of section 18-86. It further provides that the signature, verification, authentication, in spection, certification, submission, and the manner of testing the sufficiency of such a petition shall be the same as that provided for petitioners under sections 19-58 to 19-60 inclusive, except that the petition shall be filed with the municipal clerk in all cases.

Section 19-58, (concerning removal of an incumbent of an elective office, provides in subdivision (b): "The petition shall be substantially in the following form:" The form consists of a heading addressed to the municipal elerk, reciting: "We, the undersigned electors of the city (or village) of \_\_\_\_\_\_\_\_.

\*\*\*\*\*\*\* do hereby demand an election of a successor to (name of person) for the following reasons:" (reasons to be stated). With space for signatures under the headings: "Name, Rouse Number (if by a any), Street, Date of Signing." This is followed/form of affidavit to be executed, verifying the signatures "on this sheet" with specified details. Subdivision (c) of that section provides:

\*The petition shall consist of sheets having the form specified in subdivision (b) of this section, except the affidavit, printed or written at the top thereof and shall be signed by electors in their own handwriting. Opposite his signature, each petitioner shall write the street and number of his residence (if there are such) and the date on which he signs the sheet. No signature shall be valid unless the requirements in this subdivision are complied with and unless the date of signing is less than four months preceding the date of filing the petition.

It is then provided that at the bottom of each sheet shall be added the affidavit in the form prescribed in subdivision (b) which shall be signed and sworn to by a resident of the municipality; that the petition, so verified, or a duly certified copy, shall be prima

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facie evidence that the signatures, statement of residence, and dates upon the petition are genuine and true, ak that the persons signing the petition are electors qualified to vote for a successor of such incumbent, and, in sumicipalities in which electors are required to be registered, that they were duly registered voters at the time they signed the petition. A provision follows that the sheets shall be fastened together at the upper edges in one document and filed as a whole.

to determine without a jury the sufficiency of the petition."

"The clerk of the court, with whom the petition and objections thereto are filed, immediately after they are filed with him, shall present them to the judge thereof. The judge (1) shall note thereon the day presented, and (2) shall also note thereon the day when he will hear them, which day shall be not less than five nor more than ten days after the day of presentation, and (3) shall order five days' notice thereof to be given by publication in some daily secular newspaper published in the municipality, or, if there is none," for alternative notice by posting.

The petition in this case, signed with the names of 712 persons, bears file marks showing filing with the city clerk on May 2, 1945, and with the elerk of the county court on May 7, 1945. Objections thereto were filed with the latter on May 7, 1948. The objections do not bear any file mark of the city clerk. Endorsed on the objections, but not on the petition, are the notations prescribed by the statute, signed by the judge, who also entered an order on May 7, 1945, conformable to the notations. Appellants' motion, under a limited appearance, to dismiss the objections on the ground that the court had no jurisdiction of the subject matter or the persons, was denied, as was their demand for a bill of particulars, and they filed an answer to the objections. The cause was heard on the petition, the objections, and the answer, and the court entered the decree appealed from, finding that it had jurisdiction of the subject matter and the parties, and that the petition does not comply with the statute, and is insufficient under the law to warrant the

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Appellante' motion to dismiss the objections, on the ground that the court had no jurisdiction of the subject matter or of the persons, assigns as reasons therefor that (a) the objections were not filed with the city clark as provided by the statutes: (b) that the record shows that the ostition and the objections were filed with the clerk of the county court immediately before, instead of immediately "after" the expiration of the statutory five day period: (c) that the statute requires the judge to note the day of presentation and the day set for the hearing, on both the petition and the objections, and that no such notation appears on the petition: and (d) that under the statute the notice of hearing should have been published on five successive days, but was published only once. It is urged that the court erred in denying the motion to dismiss the objections on these came grounds. Appeallants also claim that the court erred in denying the demand for a bill of particulars, and in entering the decree sustaining the objections to the petition.

Jurisdiction of the subject matter does not mean simply
jurisdiction of the particular case then occupying the attention
of the court, but jurisdetion of the class of cases to which that
particular case belongs. (Pocahentas Mining Co. v. Industrial
Commission, 301 Ill. 462, 474.) Appellants confuse jurisdiction of
the subject matter with jurisdiction in the particular case. Jurisdiction of the subject matter is expressly vested in the county court
by the statute. Substantial defects in the patition or in the
objections, or in complying with the statute, might be cause for the
dismissal of either of them, respectively, but such defects do not
affect jurisdiction of the subject matter. Furthermore, if the Court
did not have jurisdiction of the subject matter, the obvious duty of
the court would be to dismiss the entire proceeding, not merely the
objections, however, fatally deficient they might be. It is equally

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manifest that if the notice of publication was insufficient, or if the petition and the objections were prematurely filed, those grounds would also go to the proceeding itself, and not werely to the objections. So, too, the claim that the judge's notations were not endersed on the petition, would not affect the sufficiency of the objections.

As to the alleged ground that the objections were not filed with the city elerk as provided by statute, the record shows that they were filed with the clerk of the county court. The statute requires the city clerk to so filed them. Obviously he could not do so unless they were previously filed with him. The statute does not require him to place any file mark thereon. No rule is better settled than that there is a presumption that public officers do their duty and that their proceedings are regular. (People ex rel. Davlin v. Auditor of Public Accounts, 2 Scam. 567, 570: Wiantic Bank v. Dennie, 37 Ill. 381, 386; Paople v. Gincinnati, Lafayette and Chicago Railway Co., 256 Ill. 289, 282-283; People v. New York Central Railroad Lines, 381 Ill. 490, 497). The presumption therefore is, in the absence of a showing to the contrary, of which there is none, that the objections were filed with the city elerk and that he filed themwith the clerk of the county court, and that the proceedings were regular. The trial court correctly denied the motion to dismiss the objections on the grounds urged by appellants.

Why appellants should urge, as they still do, that the court was without jurisdiction because the judge did not endorse his notations on the petition, or that the publication notice was insufficient, or that the petition and the objections were presenturely filed, is not apparent. If those grounds were tenable, their petition and their alleged cause of action with it, would be out of court. But we do not think that any of such grounds renders the proceeding or the objections vulnerable to a jurisdictional attack, or that any of them is of such an merit as to constitute a ground for striking the objections.

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All of the contentions of appellants as to the alleged insufficiency of the notice by publication are answered adversely in Central Illinois Public Service Co. v. City of Taylorville, 307 Ill. 311 and Crocher v. Abel, 348 Ill. 289. Cases cited by appellants under a statutory requirement for notice by six days' publication, (not six days' notice by publication) are clearly distinguishable. As to the alleged premature filing of the petition and the objections, the statute clearly means to impose the duty of promptness upon the city clerk, and not to penalize anybody by his extra diligence. There is no merit in the claim that the judge failed to endorse his notations on the petition. In any event it would not affect the objections.

An inspection of the original petition, inserted in the record by order of the trial court, discloses that more than 400 of the signers did not write the date on which they signed, but such dates are in the handwriting of some other person or persons; that two of the signers gave their residence as "Dayton, Illinois"; that eight more gave their residence as "R. F. D."; that 146 signers used ditto markes for their residence or date of signing; that fix 7 signers did not state any street address; that in 4 cases the maker of the affidavit at the foot of the sheet pertified to his own signature thereinabove; that no date appears after the names of 5 signers; that one purported signature reads: "Mr. and Mrs.

Albert Fitzgerral"; and that all of the sheets attached to the petition, bearing signatures, have no heading, as required by subdivisions (b) and (c) of section 19-58 above mentioned.

These omissions, irregularities and discrepancies asong others not necessary to be mentioned, were embraced in the objections.

While some of the objections referred to "several" signers, and some of the objections to "some" persons, and appellants claim that the court could not determine therefrom the number of signatures objected to, the discrepancies are such as appear on the face of the petition itself, without the necessity of any extrinsic proof, and

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which the court could determine by a mere inspection of the petition. The claim of indefiniteness is without merit.

The answer admits the allegations of the objections as to "several" and "some" signers, the allegations of non-residence as to certain and "several" others; the ditto marks; that several dates are in the handwriting of one person; that several signers stated no street address; that others are without any date; that the persons circulating some of the sheets certified to their own signatures; and the allegation as to the signature of the Fitz-gerrels. The answer alleges that 5720 votes were cast for mayor at the last preceding specified election. This would require 572 legal signatures to the petition. Under the mandatory terms of the statute, the irregularities, omissions or discrepancies are such that the petition was clearly insufficient. The decree of the county court is therefore affirmed.

Decree Affirmed.

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RUSSELL FIREBAUGH, Trustee, Plaintiff.

V.

ARTHUR F. JOHNSON et al., Defendants. APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

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UNION TRUST BANK,
Petitioner Appellant,

V.

WILLIAM S. NEWBURGER, Respondent Appellee.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an appeal, on leave granted, from an order discharging a rule to show cause in a civil contempt proceeding.

The appeal is prosecuted by Union Trust Bank which sought in the Superior court to have the respondent, William S. Newburger, master in chancery, show cause why he should not pay the prorata amount alleged to be due petitioner on certain nondeposited bonds in a foreclosure suit.

It is first urged by respondent that the appeal should be dismissed because, as his counsel contend, "The great weight of authority is that such an order refusing to punish for civil contempt is not appeabable." They cite no Illinois decisions, but rely on cases in other states, in most of which criminal contempts were involved. Notwithstanding their assertion that "the precise question seems never to have been passed upon by the courts of review in this State," we find in petitioner's brief several Illinois cases decided adversely to respondent's contention. A similar situation was presented in the recent case of People v. Lewe, 380 Ill. 531, where a Special Commissioner failed to make distribution of funds arising from the sale of property under foreclosure, and the court held that appeal is the proper method of review of an order of release.

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NUSSELL FIREBAUCH, Trustee,

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UNION TRUST DANK, Politico,

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FILLIAM 3. IT HV WW., TR., Respondent Appellee.

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MR. PRESIDING JUSTICT THIRM DILIVERED THE OFFICEN OF THE COLLE.

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In Hawley Products Co. v. May. 314 Ill. App. 537, it was held that an order discharging the rule to show cause was appealable, and after discussing several earlier Illinois decisions the court stated: "Nothing said in any of those cases lends any support to the claim of appellees that it is only the imposition of an imprisonment or the assessment of a fine, and not the finding of guilty or not guilty, that gives the right of review. The motion to dismiss the appeal is denied." In People v. Diedrich, 141 Ill. 665, the court held that when the proceeding is to secure and enforce a civil remedy it is for the benefit of the party complaining. "It is, to all intents and purposes, between the party insisting upon obedience to the injunction and the one charged with its violation. \*\*\* The right to appeal is in either party, as in other cases in chancery." In Lamb v. Cramer, 285 U. S. 217, it was urged by petitioner that the proceeding was criminal in its mature, to punish for criminal contempt, and that therefore the order dismissing the petition was not appealable. The petition in that case charged the contumacious acts of Lamb in diverting the property which was the subject matter of the principal suit, and the prayer of the petition, which the court characterized as "determinative of the nature of the proceeding," was to secure restoration of the diverted property in order to carry out the decree in the principal suit. The court cited Lamb to show cause why he should not be punished for contempt and why he should not be adjudged to hold the property subject to the jurisdiction of the court, and in determining whether the order of discharge was appealable, the court said: "To the extent that this purpose might be effected by process against Lamb for contempt, the proceeding was remedial, to aid in giving to the plaintiffs the property which, as against the defendants in the principal suit, they were entitled to receive. It is the

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purpose of the punishment, rather than the character of the act punished, which determines whether the proceeding is for civil or criminal contempt. \*\*\* Even though the particular acts of the petitioner may take the characteristics of both a civil and a criminal contempt, and so may not be classified as exclusively one or the other, \*\*\* still, under the allegations and prayer of the petition, it would have been competent for the District Court to punish the contempt by its coercive order until Lamb made restitution of the property or to impose a fine, payable to the receiver, compensating for its taking. A proceeding to secure such relief is civil in its nature." (Italics ours.) From the foregoing decisions it appears to be the clearly established rule that petitions of this nature whose purpose is to secure restoration or enforcement of property rights, are held to be civil contempt proceedings, from which either party may appeal, and inasmuch as respondent concedes that the case at bar involves civil contempt, an appeal is the proper method of review of the order of discharge. the motion to dismiss the appeal is denied.

Upon consideration of the appeal on its merits, it appears from the pleadings and evidence that in July, 1929 Mrs. Hedwich Gertze purchased from one Hardt, a dealer in securities, bonds numbered 109 and 110, and paid him the par value thereof, \$500.00 for each of said bonds or a total of \$1000.00. These bonds were part of an issue of 280 bonds in the aggregate principal sum of \$93,500.00, evidencing an indebtedness on improved property described as Faylor Apartments in Chicago, secured by a trust deed under which Russell Firebaugh was designated as trustee. The property was subsequently foreclosed, and a decree of foreclosure and sale was entered December 23, 1930 in the Superior court. The premises were offered for sale February 16, 1933 and bid in by Russell Firebaugh as trustee. Certain bonds

nurpose of the punishment, rather than the character of the act punished, which determines whether the proceeding is for givil or original contempt. \*\*\* Even though the particular acts of the petitioner may take the characteristics of both a civil and a criminal contempt, and so may not be classified as exclusively one or the other, were still, under the ollogations and prayer of the petition, it would have been competen for the District Court to punish the contempt by its coercive order until lamb made restivition of the projecty or to depose a fine, payshie to the receiver, compensating for its taking. A proceeding to secure each relief is civil in its acture." (Italics ours.) From the foregoing desigions it appears to be the olerrly established rule thus portifions of this meture whose purpose is to secure restoration or enforcement of proper by rights, are held to be civil contempt proceedings, from which either party is, appeal, and incemed as respondent concedes that the case ut bar involves civil contempt, an adject in the proper method of review of the order of distharge. Therefore the motion to dismiss the appeal is demied.

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aggregating \$92,600.00 were deposited with respondent as master in partial payment of the bid. Bonds 109 and 110 were not so deposited with the master. From the master's supplemental report it appears that there were undeposited bonds in the principal sum of \$5900.00, including bonds numbered 109 and 110 for \$500.00 each. The master stated that holders of nondeposited bonds were entitled to receive \$88.09 for each \$100.00 bond and were to be paid their proportionate share of monies deposited with him on account of the deficiency. He made no accounting as to the monies received by him for the nondepositing bondholders, but admits that he received \$4,800.00, somewhat less than the aggregate amount of nondeposited bonds.

Mrs. Gertze testified that she retained bonds numbered 109 and 110 in her possession continuously from July 1929, when they were purchased, until May 1943, when she sold them to the Union Trust Bank for the sum of \$400.00, which was paid to her, and in confirmation of her earlier assignment on May 3, 1943 of the proceeds in the master's hands, she did, on October 22, 1943, expressly assign in writing to the Union Trust Bank, the petitioner, all her rights as the holder of bonds numbered 109 and 110 to the proceeds of sale held in the hands of respondent as master in chancery of the Superior court.

Respondent was the master in chancery in the foreclosure proceedings and conducted the sale of the property under the decree for the sum of \$93,000.00. His report shows that bonds aggregating \$92,600.00 were deposited with him in payment of the bid, and the precise numbers of the bonds are set out in his report, which appears in evidence. Bonds numbered 109 and 110 were never deposited with respondent as master and did not comprise any part of the bonds aggregating \$92,600.00 which were deposited with him. His supplemental report shows that

aggregating .92,000.00 wert deposites at an respondent as master in partial payment of the .4d. Tonds 1.9 and 110 were not so deposited with the asster. From the ameter's supplemental report it appears that there were undeposited bonds in the principal sum of 9,900.00, including bonds numbered 1.09 and 110 for .500.00 each. The scatter stated that holders of nondeposited bonds more condition to receive that holders of nondeposited bonds more condition to receive portionate share of monteposited with information account of the deficiency. He made no accounting as to the montes of account of the deficiency. He made no accounting as to the montes of the increase but admits the received the nonegonital bonds. Sourced the nonegonital bonds.

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holders of nondeposited bonds of the aggregate of \$5900.00 were entitled to the sum of \$5197.52 in cash, or \$88.09 for each \$100.00 bond. Accordingly bonds numbered 109 and 110, each in the sum of \$500.00, aggregating \$1000.00, were entitled to a proportionate distribution of \$880.90. It must be assumed that the master received the money for the nondeposited bonds because there is no countervailing proof or denial of the fact, and therefore the owner and holder of the bonds is entitled to the pro rata share of the money deposited with the master.

Respondent's answer denied that petitioner is a duly organized and existing banking corporation, and averred that "there has never been any Union Trust Bank organized in the State of Illinois," denied that Union Trust Bank is a corporation, and averred that the articles of incorporation of the bank, "if it is such a corporation," have never been filed in the Recorder's office of Cook County, Illinois, and that by reason thereof "the said alleged corporation has no right or authority to file the petition herein or for any relief in the Courts of this State." As against these averments it appears from exhibits and court records received in evidence that in June 1942 a complaint in the nature of quo warranto was filed in behalf of the people of the State of Illinois by the attorney general of the state in the Circuit court of Du Page county, questioning the organization and existence of the Cloverdale State Bank (whose name was subsequently changed to Union Trust Bank), and pursuant to evidence presented in open court and the arguments of counsel, a decree was entered on June 12, 1942 by Judge William J. Fulton, who was then the judge of the Circuit court of Du Page county, as follows:

"1. That the Cloverdale State Bank is organized as a banking corporation under an act entitled 'An Act to Revise

holders of nondeposited bends of the aggragate of \$5900.00 were entitled to the sum of \$597.52 in cash, or \$83.09 for each \$100.00 bend. Accordingly bonds numbered 109 and 110, each in the sum of \$500.00, aggregating \$1000.00, were entitled to a proportionate distribution of \$500.00. It must be assumed that the master received the many for the nondeposited bonds because there is no countervalians proof or denial of the fact, and therefore the owner and holder of the bonds is estimated to the property since of the bonds is estimated.

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11. That the Cloverdale State Bank is organized as a banking corporation under an act catified 'An Act to Revise

the Law with Relation to Banks and Banking," and a charter to said Cloverdale State Bank was issued by the Auditor of Public Accounts of the State of Illinois on December 3, 1920.

"On July 6, 1922, the Auditor of Public Accounts of the State of Illinois issued his permit to do banking business to said Cloverdale State Bank; that said charter was, on July 8, 1922, duly filed for record in the Recorder's Office of DuPage County, Illinois, in Book 11 of Miscellaneous Records on Page 521, as Document Number 157259; that said permit was duly filed for record in the Recorder's Office of DuPage County on July 8, 1922, in Book 11 of Miscellaneous Records on Page 521, as Document 157260.

- "2. That during the year Nineteen hundred and twentynine, the said bank was properly and lawfully removed to Roselle, Illinois.
- "3. That on June 30, 1930, the Stockholders of the said bank, Adopted a Resolution, to Change the Place of Business of the said Bank, to the Unincorporated Area, in Proviso Township, in Cook County, Illinois, without and between the boundaries of the Corporate Limits of the Village of River Forest and Maywood, in the vicinity of Lake street, First avenue and the Desplaines River.
- 14. That the Place of Business of the Bank was prior to November 4, 1930, properly and legally changed from the Village of Roselle, Illinois to the Unincorporated Area, in Proviso Township, in Cook County, Illinois, without and between the boundaries of the Corporate Limits of the Villages of River Forest and Maywood, in the vicinity of Lake street, First avenue and the Desplaines River.
- "5. That on September 23, 1936, the name of the said bank was properly, regularly and legally changed by the

the Lew with Relation to Sanks and Banking," and . charter to said Cloverdale Late Mank was issued by the Auditor of Public Acscumts of the State of Hillnois on Seconder 3, 1920.

"On July 6, 1982, the Anditer of Public Scients of the State of Hillinois issued als permit to do Panting basiness to sidd floverdade State and; that said charter was, on July 8, 1962, mly filed for record in the Leondar's Cffice of Dalage Jounty, Filinois, in Fook 11 of Piscellensous Records on Page 501, as records anthe Said permit was duly filed for record in the Leonact's Charteria Dalage Jounty on Page 501, as record in the Colonary Charterian of Said Said Said County on Page 501, as covered in the Colonary Charterianeous Said Said on Fage 521, as covered 197266.

\*2. That such general modern hundred work tent, while the only the only beauty was provered, and is fully removed to coolie, which is fully removed to

"J. That on case 50, 1930, the Special lers of the stid bank, dopted a Poschtian, to hange the Phase of Paginess of the cold Rule, to the Unincorporated free, in Proviso formship, in Cook sourty, allinois, direct and between the boundaries of the Corporate Limits of the Village of River Porest and Mayvow, in the visinity of Roke street, Pirst avenue and the Posphainse Tiver.

to November 4, 1030, properly and legally changed from the Village of Roselle, Illinois to the Unincorporated rea, in Provise Township, in Cook County, Illinois, althout and between the boundaries of the Corporate Limits of the Villages of River Morest and Mrywood, in the vicinity of Lake street, First avenue and the Desplaines River.

"5. First on September 23, 1936, the name of the said bank was properly, regularly and legally changed by the

stockholders thereof to Union Trust Bank.

- "6. That the conduct and operation of said bank has been in strict accordance with the terms of said charter and in strict accordance with the statutes of the State of Illinois.
- "7. That the said bank has been conducted in a lawful, proper, legitimate manner serving the general banking public.
- "8. That all of the issues presented in the complaint herein, and by the answer filed thereto, were determined and adjudicated contrary to the contentions of the People of the State of Illinois, in Case Number 58805 in the Circuit Court of Sangamon County, entitled 'Cloverdale State Bank, a Corporation, vs. Oscar Nelson, Auditor of Public Accounts of the State of Illinois.'

"It Is, Therefore, Ordered and Adjudged that the complaint in the nature of a Quo Warranto heretofore filed herein be and the same is hereby dismissed and that the respondent have and recover its costs and charges in this behalf expended."

The attorney general, representing the people of the State of Illinois, sought leave to appeal to the Appellate court from the order thus entered by the Circuit court of Du Page county, but the application was denied and the judgment of the Circuit court was made final. In view of the foregoing record, further comment as to the averments in respondent's answer challenging the existence of the Union Trust Bank and its authority to file the petition, would seem unnecessary.

The remaining defense interposed in respondent's answer may be summarized as follows: he denied that the bank had on May 3, 1943 or at any other time purchased bonds numbered 109 and 110, and he averred, on the contrary, that said bonds

stockholiers thereof to Union I wat Benk.

"6. That the conduct and operation of said bink has been in strict accordance with the terms of and in strict accordance with the structus of the State of Illinois.

"7. That the said benk has been contucted in a lawful, proper, legitimate names apprehish the general banking public.

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"The Isy themofore, Courses on the injudged Clark the conplaint in the author of a me man no territology filled herein to me the same in territy of this or any that the projectant have an recover it, restant the course that the felalit

The attorney general, note the people of the tate of Illinois, condition to appeal to the specific spart from the order that the sale of the specific sourt of he pegs county, but the span into the threat and the judgment of the Circuit court of the circuit court of the span of the Circuit court of a span line. In view of the foregoing resord, further comment as to the systemate in respondent's answer shellenging the sales are challenging the sales are of the finion frust bank and its sutherably to like the perhitor, ould seem unnecessiry.

The remaining defense interposed in respondent's answer may be summarized as follows: he denied that the bunk had on they 3, 1943 or at any other time purchased bonds numbered 109 and he averred, on the contrary, that said ands

were deposited with him as part of the purchase price at the time of the sale under foreclosure, and that he had deposited said bonds, together with many others, as part of the purchase price with the clerk of the Superior court, but that bonds numbered 109 and 110 were stolen from the files by persons unknown, and that the bank therefore had no title to the bonds or any right to the funds deposited with him for nondepositing bondholders. Respondent's supplemental report is a sufficient answer to these allegations because, as heretofore stated, his report, which appears of record, shows that bends numbered 109 and 110 were never deposited with him as master and did not comprise any part of the bonds aggregating \$92,600.00 which were deposited and accepted by him in payment of the purchase price at the sale. The averment that bonds numbered 109 and 110 were stolen is not supported by any evidence and is entirely refuted by the testimony of Mrs. Gertze, who stated without contradiction that she purchased said bonds in 1929 and retained possession thereof from that time until May 1943, when she sold them to the Union Trust Bank for \$400.00.

Respondent's brief upon the merits of the controversy affords scant enlightenment. Petitioner's counsel says that it "barely exceeds the dignity of mere epithet." So far as we are able to understand, the principal defense is that the whole background is irregular; that the bank has no banking facilities, maintains only a post-office box in Maywood, that the president's office is in the La Salle Hotel, that the bank has no employees other than its president, secretary and treasurer, and that in August 1943 the president informed the auditor of public accounts that the bank was unable to carry on a banking business, as authorized by its charter, and stated that the books and records of the bank did not disclose any current operations. Even if true, these circumstances would not preclude petitioner from

were deposited with him as part of the preciam price at the time of the sale under for closure, and that is incl deposited said bonds, together with many others, as part of the purchase price with the closic of the Capacier court, but that bours numbered 109 and 110 were stolen from the files by persons unknown, and that the bank therefore ind no title to the rol min dut. Poileogel about edd of ingir you to abood mendepositing bondhelders. Respondent's sapelumental report is a sufficient answer to those all gardens because, as heretefore stated, his report, which speak o'recor, shows that bonds numbered 109 and 110 ..ers m ver legocited ... tan idm as master and did not comprise any pure of the bunds of properting \$92.600.00 which were deposited and solepted by this in payment of the purchase price at the sate, The averant that bonds numbered 109 and 110 were stolen is not su jorted by any syldensu and is embirely reduced by the tratheony of frs. tertile, who at about three meanitume and that motively rinco fundity betata 1929 and noveled possertion lights that the time and mountains and 1943, when the lold than to the infor ant. Lank for studio.

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maintaining its cause of action or excuse the master from paying the pro rata share of the bonds owned by the bank from the proceeds of the sale, which he admittedly held.

Even if petitioner corporation had been dissolved, it could sue to collect its assets (Commercial Trust Co. v. Mallers, 242 Ill. 50), but no such claim is asserted as a defense.

In support of its claim, L. A. Mitchell, president of the Union Trust Bank, supplemented the documentary evidence by oral testimony. He stated that he started in the banking business with the First National Bank of Chicago in 1917 and had been president of the Cloverdale State Bank since 1936 and of the Union Trust Bank since the name was changed; that the bank was first located in Cloverdale and then in Roselle, Illinois; that the bank has a secretary, a treasurer, and a corporate seal of which the cashier is custodian, and that he (Mitchell) as president resides at the La Salle Hotel in Chicago; that the bank is incorporated for \$10,000.00, has assets in the aggregate of \$15,000.00 or \$17,000.00, and conducts a limited banking business under his direction. In the course of the trial respondent called John W. F. Smith, a bank examiner for the auditor of public accounts, who testified that under date of August 20, 1943 he received a letter on the letterhead of the Union Trust Bank, signed by its president, L. A. Mitchell, as follows:

"In reply to your letter of August 12, 1943, I wish to advise that since no suitable building is available in the authorized area in which the Union Trust Bank can operate, and since it is impossible because of the war condition to construct a building at this time, the Union Trust Bank is unable to assume a banking business as authorized by its charter and laws of the State of Illinois. The books and records, however, of the Union Trust Bank are available for your inspection at such time and

maintaining its ease of ation or excuse the master from prying the processes of the sole, which he auditedly held. from the processes of the sole, which he auditedly held. Even if petitionar supportion and peen absolved, is sould rue to collect its sucks (porterplassively for v. ibliers, are to collect its sucks (porterplassively as a celence.

in our ord of its distriction, i. i. i. minio est to due out of the enter must been a sup- I are a substant manning by ord I bestimong, it stated what is it it in the bunding betiness with the thet he donel and of shorp in his and had been prosident of the Lover I. this call hace 1976 trud ; son me can only sou tonic wine the mean son to bro the bank of a little Roseted in they am no the case than in .oscile. Illinois; Shed the hank has a soundery, a dreamant, and a scriper we scall of units of a first is extendish, on that he is the the first for the marketing of the first like interest (all offers) is the first and is incomposed to the section of the section in the botinil a stommer in , we is no . . . . to strong a smain, bust was well fill fraction. In all source of the trick at lier of gradit seconds, the beautiest that among date of winst 20, 1990 h and fred will the on the methadad of the as alfaloud . As any attended by the land to be and moin :a /offet

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The trial of the cause was only partly concluded. The chancellor seemed to be exercised over the fact that Russell Firebaugh, whose reliability he questioned, had been instrumental in calling Mitchell's attention to the availability of Mrs. Gertze's bonds, and by reason thereof he apparently entertained some doubt that the Union Trust Bank was the rightful owner of these bonds. Therefore in the midst of the proceeding he terminated the hearing abruptly by discharging the rule and dismissing the petition. Respondent does not complain about this course of procedure, but seeks to justify it on the same theory that the chancellor adopted, namely, that the whole proceeding was fraudulent, a "hold-up," and "one of the rottenest things that have come before me," supported by the contention that "A court of equity has inherent power to dismiss an action in fraud of justice, or actions which are merely groundless, vexatious and harassing." It may be conceded that Firebaugh called Mitchell's attention to the fact that these bonds could be purchased and assisted the Union Trust Bank in acquiring them, but these circumstances cannot and certainly should not operate to defeat the claim of the Union Trust Bank which paid a valuable consideration for the bonds. Although the proceeding was not fully heard, there is abundant evidence of record to support a money decree, as prayed by petitioner, especially in view of the fact that respondent does not complain of the

place as you may designate. These books and records will not disclose any current operations, aince the beak has accepted no deposite for some time. Fut whatever handing transcribers have been have in the . St are available for your inspection. This litter afterds some explanation of the reson or will the bank had no banking quarters, but that circumstance walk not proclude it from asserting its claim to the proclude it from asserting its claim to the procuse walk not bonds much and 109 carling its claim to the procuse walk not

The brief of the class vot only pertly constraind. The dismoslior seemed to be exercised pear the foculting the lease in Throbaugh, whose religibility on youthoused, we boun undermental in colling diteirable ablantion to the vallebility of Mrs. Controls bonds, and by is see the not be synam after the fundings on the limit turn point off that the pros benish owner of three bonds. Therrieve is the list of the transmission In of we have a programmed of the one god the out before out of duon a minimum son as the amentoques . Sidiffe and inhechralb Li. course of procedur, but steet to justify it in the same -org efect of the language production and the control of the control coeding was frequilent, a "roin-pp of the color cotheras things that invo come letoes as the court the conferration that 'A court of equity has injurent jover to distal an action in fixed of justice, or articar which error wiely a cumiless, versitious and harcasing. " It may be conceded that Pireb agh dalled liltehell's attention to the first that the bond, could be purchased and sasilited the Union Iract land in at paining tion, but these utrounstances around and certainly about not operate to defeat the claim of the Union Trust Bank which paid a valuable consideration for the bonds. Although the proceeding was not fully heard, there is abundent evidence of record to support a money decree, as prayed by petitioner, especially in odf ic nisignos for seeb inshrocses that feel out to weiv -11-

abrupt termination of the case or ask that he be allowed to produce further evidence. Therefore, the decree of the Superior court is reversed and the cause is remanded with directions that a decree be entered requiring respondent, the master, to pay petitioner the amount allocable to its bonds.

DECRET REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

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ROSE CIPICH,

Appellant,

V.

CITY OF CHICAGO, a municipal corporation, Appellee.

APPEAL FROM SUPERIOR COUPT,

328 I.A. 580

COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On the evening of September 25, 1941 plaintiff fell into a large unlighted hole in the sidewalk on East 91st street in the City of Chicago and was severely injured. Two months thereafter, on November 25, 1941, what purports to be a statutory notice, drawn in the technical language of the statute but not signed by plaintiff, her agent or attorney, was served upon the city. Thereafter on January 19, 1942, which was six days less than four months after the accident, plaintiff filed her signed complaint in the Superior court, accompanied by her affidavit wherein she deposes and says that she had read the complaint by her subscribed, that she knew the contents thereof and that it was true in substance and in fact. Upon trial before a jury plaintiff offered the defective notice in evidence, upon which the court reserved its ruling, and adduced evidence as to the manner in which the accident occurred, the condition of the sidewalk and the injuries sustained by her. At the close of plaintiff's case the city moved for an instructed verdict on the ground that the notice was defective. The court granted the motion, directed a verdict for defendant and entered the judgment from which plaintiff appeals.

With respect to personal actions against municipalities sections 1-11 and 1-12, chapter 24, Ill. Rev. Stat. 1943, provide as follows:

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ROSE CIPICA,

Appellant,

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M. PHY IDING JUSTICE FILMD DILLYIMED THE CLIR ON OF THE COUNT

Un the ovening of September 15, 1941 plaintiff fell into a large unlighted hole in the sidewalk on what Flat Street in the City of Chickgo and was several influred. Two months thereafter, on Hovember 25, 1941, that purports to be a statutory notice, drawn in the lead to lead landage of the statute but not signed by plainerin, her agent or attorney, was served upon the city. Increidter on January 19, 1942, videh was six days ness then four months after the socient, plaintiff filed her claud complaint in the Superior court, accompanied by her affidevit wherein she deposes and cays that she ind read the complaint by her subscribed, that she knew the contents transfer the that it was true in substance and in fact. Joon tried before a jury plaintiff offered the defective notice in evicace, upon which the court reserved its raling, and adduced evidence as to the manner in which the cost out coursed, the condition of the To oxolo out the . Ten yd benistata eshu ini ent ben alswebia plaintiff's once the city moved for an instructed verdict on the ground that the notice was defactive. The court granted the notion, directed a verdict for defendant and entered the judgment from which plaintiff appeals,

With respect to personal actions against unnicipalities sections 1-11 and 1-12, chapter 24, Ill. Rev. Stat. 1943, provide as follows:

"1-11. Notice within six months.) Within six months from the date that such an injury was received or such a cause of action accrued, any person who is about to commence any civil action in any court against any municipality for damages on account of any injury to his person shall file in the office of the city attorney, if there is a city attorney, and also in the office of the municipal clerk, either by himself, his agent, or attorney, a statement in writing, signed by hirself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any.

"1-12. Dismissal of suit if no notice filed.) If
the notice provided for by section 1-11 is not filed as
provided in that section, any such civil action commenced
against any municipality shall be dismissed and the person
to whom any such cause of action accrued for any personal
injury shall be forever barred from further suing."

Under the established rule in this state where any of the essential elements of the notice are omitted motion of defendant for a directed verdict should be allowed. Ouimette v. City of Chicago. 242 Ill. 501; Keller v. Tomaska, 299 Ill. App. 34; Minnis v. Friend, 360 Ill. 328. It is urged however that as a result of the injury sustained plaintiff was rendered non compos mentis and should therefore be excused from serving the required statutory notice. Plaintiff's counsel rely principally on McDonald v. City of Spring Valley, 285 Ill. 52, to support this contention. In that case Margaret McDonald,

From the date that such an injury was reselved or such a cause of action mestrad, any person who is choose to consenct any civil action in any ecurt against any manishpality for damages on secount of any injury to him person shall fille in the office of the sity actionary, if there is a city anticipality for in the office of the sity actionary, if there is a city attorney, and also in the office, by and also in the office, by a strange in the either by himself, his a gant, or a tion approach in writing, signed by himself, his agent, or therefore the city does the accuracy of the name of the person to when the cause of desire is a correct, the name of the nam

"1-11. Justsed of mily if no notice filled as the notice provided for by section 1-11 is not filled as provided in that section, any even civil editor convenced against any municipality shall be dispisable and the person to when any such cause of action accured for my personal injury shall be forever hereof from inthes wring.

Under the established rule in this attachment one the escential elements of the notice are outtied notion of defendant for a directed variet anotic desired a directed variet anotic desired. Outsette v. Outsette v. Otty of diverse. 242 111. 901; indice v. Connela, 299 711. 129. 34; Einste v. Trient, 100 1111. 128. It is arged however that as a result of the injury sustained plaintiff was rendered non compos mentic and should therefore be excused from serving the required statutory notice. Plaintiff's coursel rely principally on Mohomald v. City of Apring Valley, 285 111. 52, to support this contention. In that case Margaret Mohomald,

aged seven, by her next friend brought suit against the City of Spring Valley for injuries resulting in the loss of the third finger of her left hand. The declaration alleged that on account of her tender years plaintiff did not know and was not informed by anyone of the provisions of the statute concerning suits at law for personal injury against cities, villages and towns and that on account of her tender years and her physical and mental incapacity it was impossible for her to give notice or to comprehend the requirements of the statute. Defendant's demurrer to the declaration admitted the foregoing allegations. The court pointed out that the recognition by the law of the status of infants and their exemption up to a certain age from liability under the law is so well known that it must be presumed that the legislature in enacting such a statute as the one under consideration did not intend by the general language used to include within its provisions a class of persons which the law has recognized as being utterly devoid of responsibility and held that the statute in question does not apply to a child seven years old who is physically and mentally incompetent to give such notice. We followed that decision in Oran v. Kraft-Phenix Cheese Corporation, 324 Ill. App. 463, wherein a minor failed to file a rejection of his right under the Workmen's Compensation Act (Ill. Rev. Stat. 1943, ch. 48, secs. 138 et seq.) within six months from the date of an accident as a condition precedent to enforcing his common-law rights, holding as the court did in the McDonald case that to charge a minor who has no legal guardian with the responsibility of filing a rejection would amount to imposing on him an obligation which he could not possibly perform since he would be incapable of appointing an agent or attorney and could not because of his

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age act for himself. In the case at bar however plaintiff was of legal age, married and was accompanied by her husband on the night of the accident, Although she was undoubtedly severely injured either she or her attorney served what purports to be a statutory notice drawn in the technical language of the statute but not signed by her, her agent or attorney. Moreover it appears that approximately two months after this notice was served on the city plaintiff filed her complaint which admittedly bears her signature and a jurat also signed by her saying that she had read the complaint, knew the contents thereof and that it was true in substance and in fact. These circumstances would certainly preclude her from contending that she was non compos mentis and remained so during the entire six-month period during which the notice should have been served. The statute permits the required notice to be signed either by plaintiff, her attorney or agent. Presumably the notice was prepared by her attorney because it appears to be a legal document and conforms in every respect to the requirements of the statute except that it bears no signature. This would indicate that the person who prepared and served the notice was remiss in complying with the statute. The authorities are in accord that such a defect is fatal and requires the court to direct a verdict. The judgment of the Superior court is therefore affirmed.

JUDGMENN' AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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age act for himself. In the cook of b o horever rightiff was of legal age, wirried ind was accompanied by her husband on the night of the necticat. Ithough she was undoubtadly severely injured either she or her attorney served what purports to be a stateliory notice drawn in the technical Language of the stairte but mot signed by her, her egent or attoant. Therefore it is is the approximately two months after this cotice was come if on the abig whatmeting filed her constitut which i destroyer by no her nighting and a jurat also signed by array a read to benefit cale through a bus complaint, bury the contents thought of the fit was true in sabstance and in fact. The street three reall cartefinly and remained so during the ordine ste-archive ended during which the mostor should have been served. The thainto remains the required notice to be at made that the leining. her oblorney or agent. Tresum bi, the nobles of right by her atterney beschar it, percent to be all conforms conforms in every reasest to the sectionalist of the stitute at the it beers no sign ture. This this this to be did bee person who prepared and served U.c. rolling a reliabling one foregapting with the stainte. The attended of a confidence of the such a defect is fixed and roughly but onet so there's a vordict. The judgment of the Jupanion sourt is to refer allimed, JECT P. PRINTER

Scenlan and Sullivar, JJ., concer.

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CITY OF CHICAGO, a Municipal Corporation, Appellee,

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GERTRUDE BONN,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

328 I.A. 581

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Late in the afternoon of November 20, 1944 the defendant, Mrs. Gertrude Bonn, was arrested in Goldblatt Brothers! Department Store, charged with disorderly conduct while intoxicated, taken to the 11th street and Wabash avenue police station in a patrol wagon, confined in jail that night, and the next morning a verified complaint was filed charging her with improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city, in violation of section 193-1 of the Municipal Code of Chicago of 1939, as amended. She was then brought before the trial judge who examined the complaint and the person presenting it, appended his certification that proper cause existed for filing the complaint, and granted permission to file the same. The defendant having waived a jury trial, the cause was heard by the court, and pursuant to the presentation of evidence defendant was found guilty of violating the ordinance set forth in the complaint and fined five dollars and costs. Subsequently, on December 1, 1944, a motion was filed on her behalf for a new trial and in arrest of judgment. After hearing extensive evidence the court denied the motion and defendant prosecuted this appeal.

In the argument on the "facts" defendant's counsel devotes seven pages of his eighteen-page brief to matters which do not appear in any report of proceedings at the trial but are taken from a report of proceedings had after defendant

CITY OF CHICAGO, a Municipal Corporation, Appellos,

.V

GERRANDE BONN,

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APPEAL PROM MUNICIPAL COULT OF CHICAGO.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Late in the efternoon of Fovember 26, 1944 the defendant, Mrs. Gertrude Bonn, was carested in Goldblatt Brothers' Department Store, charged with disorderly conduct while intoricated, taken to the lith street and Vabash avenue police station in a patrol wagon, confined in Jail that night, and the next morning a verified complaint was file! obserging her with improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city, in violation of section 193-1 of the Lunicipal Code of Chic.go of 1939, as amended. She was than brought before the trial judge who examined the complaint and the person presonting it, appended his certification that proper cause oxisted for filing the complaint, and granted permission to file the same. The defendant having waived a jury trial, the cause was heard by the court, and pursuant to the presentation of evilence defendant was found guilty of violating the ordinance set forth in the complaint and fined five dollars and costs. Subsequently, on December 1, 1944, a motion was filed on her behalf for a new trial and in arrest of judgment. After hearing extensive evidence the court denied the motion and defendant prosecuted this appeal.

In the argument on the "facts" defendant's counsel devotes seven pages of his eighteen-page brief to matters which do not appear in any report of proceedings at the trial but are taken from a report of proceedings had after defendant

filed a motion for a new trial and in arrest of judgment.

The principal ground urged for reversal is that "defendant did not knowingly, expressly, or understandingly, waive a jury or right to have counsel." However, the review here is on the common-law record alone which discloses that defendant waived trial by jury on November 21, 1944 when the cause was heard; and that statement in the record imports verity and is conclusive. In City of Chicago v. Harrington. 263 Ill. App. 47. it was held that "the record imports verity and cannot be successfully contradicted by statements in the brief. The defendant having waived his right to a jury trial cannot now be heard to complain that the court tried the case without a jury." The case at bar was not a criminal proceeding in which a written jury waiver is required; it is an action by the city to recover a penalty for the violation of an ordinance in a civil suit. City of Chicago v. Shreffler. 175 Ill. App. 547; City of Chicago v. Knobel, 232 Ill. 112; City of Chicago v. Streeter, 152 Ill. App. 463; and City of Chicago v. Williams, 254 Ill. 360. Therefore, if defendant desired a trial by jury it was incumbent upon her to assert it, not on a motion for a new trial but on November 21 when the hearing was commenced. Rule 59 of the Municipal court provides that in actions where either party is entitled to a jury trial, the case shall be tried without a jury unless a demand in writing for a trial by jury is filed by the plaintiff or by the defendant, and if the demand is made by the defendant it must be filed by him at the time he enters his appearance. The record before us shows no demand by defendant for trial by jury until after the entry of the judgment. It would therefore seem that in view of the recitals in the record explicitly stating that a jury trial was waived and the failure of the

filed a motion for a new trial and in trees of judgment,

The principal ground urged for reversed in that

"defendant did not knowingly, ampressing or make stembingly, waive a jury or right to heve doubsel. However, the review here is on the correspelan record alone which theleses that defendant salved writh by fury on lovember 23, 1946 men the cause was heard; and that to tented in the person as sense verity and is conclusive, in ity of Macono v. Harrington, 26, 111. . p. 47, it was held that the record in orth verity and cam of to savessa fully contribited by eleterate in the brief. The dolondant having waited his elect to a jary trial eart and be branch to consider that the seart order the case - Laceborg Larimine a fon any red of we o off ". prof a trodita ing in which a written har a rever is received at the action by the picy to recover a paralty for the riol lion of an ordinarce in . sivil sait. Sity of Ship go will entered up 175 111. (pg. 547; 1157 of litting v. 10001, 652 111, 112; light of the go we streeten. If it is a second light of the gold o Inio to v. Millens, SSA Till, Job, Mare one, It toffend no Steller or ted Hogy the Burnl the of thing of Init's a feriesa it, not on a notion for a new Unit I had at Forenter il then the hearth, was commoned. The policy of the farmony as provides that in actions there eith reporty is entitled to a jury triel, the case shall be tried without a jury maleau a demand in venting for a trial by pary is riled by the licintiff or by the defendant, and if the demand is made by the defendant it must be filed by him at the time he enters his appearance, The record before us shows no demand by describant for trial by jury until after the entry of the judgment. It would therefore seem that in view of the recitals in the mocord explicitly sat to enulist edt has beview asw ferut vrug a tedt gaitets defendant to comply with rule 59 of the Municipal court prescribing the method of obtaining a trial by jury in a case where that right exists, the defendant's principal contention is utterly without merit.

The other ground urged by defendant is that she was denied counsel. As a matter of fact she was assigned a public defender who was present in court and stood beside her when she entered her plea of not guilty, and if she had desired her own counsel she should have so stated at that time.

Included in the exhaustive evidence adduced upon the motion for a new trial is the testimony of Irving Landesman, an assistant corporation counsel who was assigned to the women's court, 1121 South State street, where defendant was tried on the morning of November 21. He stated that the clerk asked her if she wanted to be tried by the court or by a jury and that "she nodded, indicating she wanted to be tried by this judge. She nodded up and down, in the affirmative. There is a public defender assigned to that court, a Mrs. Edith Stone, who was standing right there. When the clerk asked Mrs. Bonn if she wanted to plead guilty or not guilty, she talked to Mrs. Stone a minute or two and then Mrs. Stone said 'We plead not guilty.'"

Myron Lewis, an assistant state's attorney who was also assigned to the women's court, corroborated Landesman's testimony. He said that he was standing directly behind Landesman at the bar when defendant's case was called; that Mrs. Bonn, Mrs. Stone and Landesman were standing before the bench when the clerk inquired whether defendant wished to be tried by the judge or a jury, and that Mrs. Stone repeated the question to Mrs. Bonn and then said to the court, "By the judge," and at the same time Mrs. Bonn nodded her head toward the judge. As against

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Included in the such neithe evilence wilesed non the motion for her solution for her scientist of the train of the trains of the constant competitions remarkal has access, there is the time women's court, it. We shall define the nemains of over her if the worded to is tried by the court or by diere, as in the sin is a jury on that sin is he madded up and the time while to be the by this judge. The modded up and the to the action at the stare is a paidic and after as in the sent in the stare.

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this evidence defendant testified that "I never waived jury trial and was never asked if I wanted a jury trial." However, the record, which imports verity, contradicts her statement and is supported by the testimony of several witnesses.

The foregoing conclusion would seem to dispose of the controversy, but defendant's counsel has brought up a record of some 200 pages containing evidence taken on defendant's motion for a new trial and devotes a considerable portion of his brief to a discussion of the facts, and argument that the finding of the trial court is contrary to the manifest weight of the evidence. Briefly surmarized, the evidence adduced upon the hearing by numerous witnesses indicates that defendant was found intoxicated in Goldblatt Brothers' store; that she used abusive language to the police officers and struck one of them in the face with her handbag when he attempted to persuade her to enter a cab and go home quietly. Kratzmeyer, one of the police officers, testified that he found her in the men's shoe department, sitting with her dress up about half way to her hips, and that she used very vile and abusive language. When he asked her what the trouble was, she said "None of your damn business," and when he asked her name, she responded "You are so dammed smart, why don't you find out who I am?" He testified further that when he ultimately told her he would have to arrest her she said "Go ahead, that's just what I want, I am going to sue this damned store and I am going to make them pay." Kratzmeyer gave it as his unqualified opinion that she was intoxicated.

Officer Keating stated that when he asked her who she was she said "You are a God damned copper, you ought to be able to find out who I am," and when they suggested to her that she take a cab and go home, she said "I dare you to lock

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me up." He further testified that she was intoxicated, that she was hardly able to walk by herself, that they had to lead her by the arm to get her out, and that she hit him across the face and bent his glasses.

Frank Welch, a detective employed by Joyce Detective Agency, testified that Goldblatt Brothers' Department Store bar refused to sell defendant a drink, that she fought with a colored girl at the bar, screamed and used vile language. Janet Devine and Harold Greenwald, also employees of the Joyce Detective Agency, corroborated the evidence that Mrs. Bonn was creating a disturbance in the store, that she was intoxicated, and that they finally had to lead her from the store.

Mrs. Bonn's testimony is entirely at variance with that of every other witness. She said that she was waiting for her sister, did some shopping on another floor, and because her feet were tired and her back hurt she found a seat in a secluded spot in the men's shoe department on the first floor near the Van Euren street entrance; that she had previously purchased a bag of beans in the basement, and while she was sitting there the police officers accosted her and accused her of being a shoplifter; that she did not know who the police officers were and said to them "Who the hell are you?"; that one of them then jerked her up from her seat and spilled the beans. She denied that she had been drinking or disorderly or guilty of breach of the peace, and said that she had not taken intoxicating liquor for the past five years. Subsequently plaintiff's attorneys confronted her with the testimony of two police officers. One of them, Joseph Reuter, stated that about six weeks prior thereto he received a call from defendant's husband saying that, scantily dressed, she had gone down the back stairs from the eighth or tenth floor of their

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apartment building, and could not be found; that he and his partner, John Reilly, toured the neighborhood and found defendant in an intoxicated condition, sitting on the bumper of a car at 71st street and Jeffery avenue; that it was a cool evening in November but defendant were only a dress and no hat; that they took her home and from there, at her husband's request, drove her to the Michael Reese Hospital in his car, where she was refused admittance in the emergency ward because of her intoxicated condition.

Because there is no transcript of the testimony adduced at the original proceeding, we must assume that the evidence supports the judgment; nevertheless, it would hardly seem necessary to rely on the presumption in view of the overwhelming testimony contained in the record and here briefly summarized. The trial court could not fairly have entered any other order except to deny the motion for a new trial upon the evidence presented. Defendant has already had two hearings, and there is nothing in her brief which would justify her contention that she should have another trial. The judgment of the court is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

apartment building, and could not be found; that he and his partner, John Reilly, toured the neighborhood and found defendant in an intoxicated cendition, sitting on the bumper of a car at 71st street and Jeffery avenue; that it was a cool evening in Hovember but defendant were only a dress and no hat; that they took her home and from there, at her husband's request, drove her to the Michael Reste Hospital in his car, where she was refusen admittance in the emergency ward because of her intexicated condition.

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JUNGSON CHRIDGED

Seemlan and Sullivan, JJ., concur.

43398

M. M. GORDON and P. GORDON, Appellees,

V.

VICTOR C. BREYTSPEAAK,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

32. I.m. 581

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued to recover the sum of \$1000.00 alleged to have been advanced to defendant in consideration of the signing of an agreement, which was never consummated, by him and Dr. W. H. Eddy, relating to the manufacture and sale of a vitamin product called "Vitalert." Trial by the court without a jury resulted in finding and judgment in favor of plaintiffs for \$1000.00, from which defendant has taken an appeal.

It appears that early in 1939 Dr. Eddy, who had been connected with Columbia University for 36 years teaching nutrition and physiological chemistry, devised a vitamin formula or product called "Vitalert." The defendant, Victor C. Breytspraak, a specialist in advertising, conceived and prepared a merchandising plan to sell said product through haberdasheries, cigar counters and other places catering especially to men, a set-up similar to that used in marketing "Vitamin Plus," which had been distributed, with considerable success, to a predominantly feminine trade through beauty shops and cosmetic sections of department stores, instead of through the usual drug-store channels. Breytspraak was convinced that his plan for advertising and distributing "Vitalert" had great possibilities for profitable outlets, and had discussed the matter with Norman Phelps, Chicago manager of Buchanan & Co., Inc., an advertising concern, which desired to handle the account when "Vitalert"

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M. W. COLDON and P. CORDON, Appellecs,

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VICTOR O. METHAUPRINE,

APERAL FROM CINCULE COURT, COURT,

MR. BEWILDING JUSTICH SEIZMD RELIVENCED FOR OFICION OF THE COURT.

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was placed on the market. Phelps introduced Breytspraak to M. M. Gorden and his wife, Pat Gordon, who together had established a profitable business in the preparation and sale of cosmetics under the name of "Princess Pat." Thereafter the Gordons, Phelps and Breytspraak had several meetings, during which they discussed the possibilities of "Vitalert." The Gordons were impressed with Breytspraak's merchandising plan, but wanted to be assured that they would not encounter any difficulties with the American Medical Association and that the product would not conflict with the provisions of the Federal Pure Food and Drug laws. They knew of Dr. Eddy and felt that he could eliminate all trouble by making bloassay tests of the product which both the American Medical Association and the Federal Government would recognize and approve. Accordingly, the Gordons met Dr. Eddy and Breytspraak by pre-arrangement at the Savoy-Plaza Hotel in New York City the latter part of March 1939. The proposed plan was fully discussed, and an oral agreement was there made to purchase the exclusive right to manufacture "Vitalert" according to Dr. Eddy's formula and market it under Breytspraak's plan. The Gordons agreed to pay an aggregate sum in royalties, which according to Eddy and Breytspraak totaled \$50,000.00 and according to Mrs. Gordon's recollection amounted to \$35,000.00. These royalties were to be five cents on each package of "Vitalert" sold until Eddy and Breytspraak received the sum of \$10,000.00; then four cents a package until the royalties amounted to another \$10,000.00; then three cents, then two cents, then one cent a package until the full amount was paid, whereupon the formula and the merchandising plan would become the exclusive property of the Gordons.

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By agreement of the parties a written draft of the contract was to be prepared by the Gordons' attorney. Gordons were anxious to launch the project before someone else conceived the idea of merchandising and selling vitamins for men according to Breytspraak's plan. After the meeting at the Savoy-Plaza. Breytspraak took the Gordons to the International Vitamin Company, where they consulted Dr. Laborski as to the purchase of ingredients. The Gordons then returned to Chicago. On their way to the railroad station in New York they had a conversation with Breytspraak, about which there is considerable conflict. Breytspraak testified that the Gordons wanted him to canvass the market, make advance contacts with retailers and help secure the necessary ingredients; that he assured the Gordons he would be willing to do so if they would pay him \$1000.00 for his services; and that they consented to do so. The Gordons' version of the conversation is that Breytspraak told them that he needed some ready cash and asked them to advance \$1000.00 to him in consideration of his and Dr. Eddy's signature to the contract when drawn, and on the assurance that "you may rest assured that any contract you might write within reason will be signed by Dr. Eddy and myself." In any event, when the Gordons returned to Chicago they sent Breytspraak a letter prepared by their attorney. with enclosure of a check for \$1000.00 payable to Breytspraak and Dr. Eddy, the material portions of which are as follows:

"I am enclosing you herewith check to the order of yourself and Dr. Eddy for \$1000.00.

"We just returned to Chicago today, and this afternoon went to our attorney to draw a contract. He wanted
a couple of days to do this, and then to send it to a Bank
or lawyer in New York to have it signed by you and Dr. Eddy

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or lawyer in New York to have it signed by you and Dr. Eddy

and returned at the time of delivery of the check.

"I told him that this perhaps was legally necessary, but that I had such confidence in you and Dr. Eddy that I was willing to send you the check tonight without the contract even being drawn, because you said you needed the check so badly and that I could take your word for it, as you stated in New York, that any contract we drew along the lines of our talk and that we thought was fair, would be signed by you and Dr. Eddy.

"Tomorrow, Saturday, is a short day, and it may take until Monday before a contract is drawn by our attorney. We will then send it to you, and you and Dr. Eddy can sign and return it to us. It occurs to me that there might be some additions to any contract of any kind which you would want to make. It will be impossible for us - sight unseen to agree in advance to make any additions before seeing and considering them; therefore, whatever contract we approve here will have to be signed by both of you there in order to have a deal closed. However, you know that we desire to be fair, and we are perfectly willing, afterwards, to give due consideration to any suggestions that you may have." Dr. Eddy indorsed the check and turned it over to Breytspraak, who put it through his bank and kept the proceeds thereof. With respect to this phase of the transaction Dr. Eddy testified by deposition as follows: "The Gordons said they wanted Mr. Breytspraak to continue the canvass of possible outlets for the product. Mr. Breytspraak said that he would make such a survey, which he subsequently did, providing the Gordens would, on their return to Chicago, make an advance payment of \$1,000 to cover such services. They said they would send a check for \$1,000 made out to me and Mr. Breytspraak, jointly, to apply on the contract they were having drawn up. I said

and roturned at the time of delivery of the check,

"I told him timt this perhaps was legally necessary, but that I had such confidence in you and Ir. Adiy that I was willing to send you the chock tenight unticout the contract even being from, because you said you needed the check so bedly and that I could take your word for it, as you stated in Hes fork, that an contract we drew along the lines of our talk on that we thought was fair, would be signed by you and ir. Eddy.

"Tomorrow, .. turning, in .. hort d. ... and it may taken until Monday before a centract in the on my our attorney, We will then send it to you, and you and Dr. oldy san sign and return it to us. It commes to me what there might be pales; por held emist you to to esting you of amoistible emou went to make. It will be impossible for as - lifet macen the galega or of a motting a vue of an of openavis at sorge of considering thoughthere on the contract approve here will have to be sign a by both of rou chare in order to have a deal closed. . overer, you know it to be adapt to be fair, and we are perfectly disting about rds, to give due consideration to ony anglessions which you may have," Dr. Eddy indersed the cheek on Jarned il ever to Braytsprakit, who put is through his hand and ignt the process thereof. wilest your .nt most of the transaction in. addy testim fied by deposition as follows: "The Cordons said they wanted Mr. Breytspraak to continue the canvass of possible outlets for the product. Mr. Breytsprack s.id that he would make such a survey, which he subsequently did, providing the Gordens would, on their return to Chicago, make an advance payment of \$1,000 to cover such services. They said they would send a chock for \$1,000 wade out to me and Ar. Ereytsprack, jointly, to apply on the centract they were having drawn up. I said

since the work was to be done entirely by Mr. Breytspraak I would turn over my half of the check to him for that purpose. The Gordons said this was satisfactory. They sent this \$1,000 check payable to Walter H. Eddy and Victor C. Breytspraak. I endorsed the check over to Mr. Breytspraak and gave it to him." Gordon's letter enclosing the \$1000.00 check was dated March 24, 1939. The next day Mrs. Gordon addressed another letter to Breytspraak, wherein she said that their attorney, in contemplation of preparing the contract, wanted additional information as to how far Dr. Eddy would be willing to allow the use of his name in certifying the potency of the vitamin tablets contained in each package, and she also wished to have Breytspraak verify her understanding that Dr. Eddy would undertake all bioassays of the initial and future batches or orders of the special formula and assume the responsibility for having all the literature, labels, packages, etc. approved at Washington. without additional expense to the Gordons.

Breytspraak evidently turned this letter over to Dr. Eddy, because on March 26 he informed Mrs. Gordon as to the extent to which his name could be used in connection with the "Vitalert" project, and at the same time he advised her that he would undertake all bioassays and render such service without expense other than his interest in the royalties.

When the contract was ultimately prepared several weeks later and forwarded to Breytspraak for his me and Dr. Eddy's signature, Dr. Eddy immediately notified the Gordons that the agreement "changed materially the terms agreed upon at the Savoy Plaza in this respect: it made the royalties payable out of the net profits, while our terms agreed upon at the Savoy Plaza called for payment out of each and every gross

since the cork has to be some entiredy by my regres and - my fact to min oc decide one to that ym ravo must bluow I pose. The cordons and this was satisf every, They sent this 11,000 check payed to laiter 1, hard and 100 0. Ersytsprack, I enlorged the check over to in. inglaging and gave it to bis." Compania litter male ing the 100 , check was dated sameh [44, 1939. the same by him. on one addressed smother letter to r yttpradit, versin it said that their attorney, in contract than of peraring the contract, wented relativement information as no boursmos Dr. Mady would be williamy to allow the are as at three in certifying the potency of the viterin teshet contined in each package, and she also the set of the reflection of the set of new understanding that Dr. day works and set at 110 apr gr of the initial and determ but has or order of the gradual off If miving the company of the contract of t Literature, Lobels, packages, classes, arevales time, ten, 

Emerging of the other than a function in the over to the eddy, because on archive in terms of the one in the control of the oxident to which his more could be used in admiration with the "Vitalert" project, one at the same time is advised her that he would unicritain all blocks ys an arender such service without expense other than its interest in the royalties.

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sale, beginning with the very first package sold." These changes were considered vital to both Breytspraak and Dr. Eddy, and accordingly they refused to sign the contract, and the transaction was never consummated.

Subsequently Mr. Gordon requested Breytspraak to return the \$1000.00. Numerous requests and demands were made upon him, and finally on October 12, 1939 Gordon addressed a letter to Dr. Eddy, from which we quote as follows: "Since we abandoned the vitamin idea, I have asked Mr. Breytspraak to return the \$1,000 advanced to you and him on this deal. \* \* \* I cannot help feel that a word from you will speed this matter along. I will appreciate it, therefore, if you will get in touch with Breytspraak and do all that you can for me."

Breytspraak had resided at Crystal Lake, McHenry County, for about five years before this suit was filed, and he argues at the outset that under section 7 of the Civil Practice Act (Ill. Rev. Stat. 1945, ch. 110), which provides that "\* \* \* every civil action shall be commenced in the county where one or more defendants reside or in which the transaction or some part thereof occurred out of which the cause of action arose \* \* \*," the suit should have been instituted in McHenry County, because, as his counsel argues, most of the transactions occurred elsewhere than in Cook County, within the contemplation of the statute. However, in defendant's original answer and counterclaim, which was subsequently amended, he admitted that the transaction out of which the cause of action arose, occurred in Cook County, Illinois. He appeared generally, and filed his answer and counterclaim without objecting to the jurisdiction of the court. It was not until he filed his second amended

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answer that the question of jurisdiction was raised, and under the provisions of section 11 of the Civil Practice Act and the settled rule of law in this state, the statute conferring upon the defendant the right to object to the jurisdiction of the court because suit was not brought in the proper county, confers a privilege of which a defendant may avail himself if he chooses, but if he does not plead this privilege in apt time, he will be regarded to have waived it and submitted to the jurisdiction of the court.

Iles v. Heidenreich. 271 Ill. 480; May v. Chas. O. Larson Co...
304 Ill. App. 137. These authorities hold that it becomes the duty of a party to plead to the jurisdiction of the court at the earliest moment, and that he may not under a general appearance plead to the merits of the action and thereafter raise the question for the first time.

Upon the merits of the case we are satisfied from a careful examination of the record that the contract drawn by the Gordons was not in accordance with the oral agreement of the parties in New York in that it made the royalties payable out of net profits instead of providing for payment out of each and every gross sale. Both Dr. Eddy and Breytspraak testified that their oral agreement contemplated that the written contract should provide for their royalties out of the gross sales, and it seems entirely reasonable to accept their version of the conversation because it is not seriously disputed, and also because they were selling a formula prepared and to be supervised by a recognized authority, together with a merchandising and an advertising plan from which they were warranted in expecting a certain return in the way of royalties. Under plaintiffs' interpretation of the oral agreement there might not have been any net profits, and there is nothing in the record which would reasonably indicate answer that the question of jurisdiction was raised, and under the provisions of seption if of the Civil Practice det and the settled rule of lew in this at to, the statute conforming upon the defendent the right to diject to the jurisdiction of the court is small raise well as not brought in the proper server, courter a privation of which a defendant may avail hisself if he chooses, but it is core not pland this privilege in apt the, he will be regarded to have waived it and submitted to the jurisdiction of its sourt.

Lies v. Heiderweich, Willia 480; May v. Chas. O. Larson do. 100 duty of a set; to the court the court of the services held that it becomes the duty of a set; to pland to the services held that a general at the certice the question for the first time action on theresiter appearance pland to the ments of the action on theresiter allow the question for the first time.

Upon the merits of the case or ere efficient and nogu caraful examination of the current what the contract durant the Cordons was not in accord you with the oral agreement of the parties in New Mork in that it wais the revalues payable to two trempag rol gaiblivers to bestant stillors for to two each and every group sale. Both Dr. Eddy and Breytannak out ford betalometros tromeours Laus that that belittest witten contract should provide for their roullties out of the gross sales, and it seems entirely reasonable to accept their version of the conversition because it is not seriously disputed, and also because they were selling a forenta prepared and to be supervised by a recognised authority, together with a more deading and an advertising plan from which they were warranted in expecting a certain return in the way of royalties. Under plaintiffs' interpretation of the oral agreement there might not have been any net profits, and there is nothing in the record which would reaconably indicate

that Dr. Eddy and Breytspraak were willing to indulge in such speculation. This conclusion is supported not only by the testimony of both Dr. Eddy and Breytspraak but by the fact that as soon as the written agreement was received, Dr. Eddy immediately notified the Gordons of the material changes and pointed out to them that there were some other discrepancies which he would be willing to waive provided the provision with respect to gross-sale royalties was corrected. The Gordons declined to do anything for several months, and then admittedly abandoned the idea because they felt the market was overcrowded with vitamin products and they had their doubts of the success of "Vitalert."

The remaining and important question is whether the \$1000.00 paid to Breytspraak was intended as compensation for the personal efforts he was requested to make by the Gordons in canvassing manufacturers and in determining the availability of ingredients to be used in the manufacture of "Vitalert." He rendered these services at the Gordons' request and expended considerable time and effort in canvassing chain-cigar stores in New York, Philadelphia, Boston and Chicago, as well as the leading men's clothing and apparel stores where the product was to be sold. ascertainment of this information and the making of these contacts was at that time extremely important to the Gordons, because if the product was to be successfully marketed, definite outlets for the sale thereof had to be assured, and it seems reasonable to suppose that when they asked him to render these services they were willing to pay him for his time and effort. We have already quoted Dr. Eddy's testimony as to this phase of the transaction. He states explicitly that the Gordons wanted Breytspraak to continue the canvass

that Dr. Addy and Preytsprask were willing to indulge in past speculation. This conclusion is supported not only by the testiaony of both Dr. Iddy and Breytspraak but by the fact that as soon as the written agreement was received. Ir. Iddy immediately notified the lowdons of the material changes and pointed out to them that there were some other liser pancies which he rould be willing to waive provided the providantita respect to gross-cale regulation as corrested. The devices deciined to do anything for saveral months, and then admittedly abandoned the Luca because they falt the market was evereadly abandoned the Luca because they falt the market doubts of the saccess of "Italian, products and their their that."

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of possible outlets, which Breytspraak agreed to do, providing the Gordons would, on their return to Chicago, make an advance payment of \$1000.00 to cover such services. That this was Dr. Eddy's understanding of this transaction is borne out by the fact that he indorsed the check which was made out jointly to him and Breytspraak, and turned over his share of the proceeds to Breytspraak because, as he thought and stated, Breytspraak was entitled to it. If the \$1000.00 check had been paid either on account of the first \$5000.00 in royalties or as a consideration for the signing of the contract by Breytspraak and Dr. Eddy, as the Cordons contend. Dr. Eddy would have been entitled to one-half of the proceeds thereof, and he was undoubtedly fully aware of that fact. The only circumstance that could cast any doubt upon this phase of the transaction is the first Gordon letter, dated March 24, 1939, in which the check was transmitted. This letter contains the self-serving statement that "I was willing to send you the check tonight without the contract even being drawn, because you said you needed the check so badly and that I could take your word for it \* \* \*." The version of the \$1000.00 transaction given by Breytspraak and Eddy is much more probable, and there is ample evidence to support it.

It is entirely conjectural, of course, to speculate on whether the controversy as to the \$1000.00 check would have arisen if the transaction had been consummated and successfully carried out, but as we read the record the Gordons were solely responsible for the failure of the transaction, because they had their attorney draw a contract, the vital portion of which relating to royalties, changed entirely the method by which Eddy and Breytspraak were to be compensated for their formula, services and idea,

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and then for several months refused to do anything about the matter until they ultimately decided to abandon the project for the reasons already stated, and it seems to us that their demand for the return of the \$1000.00 was an afterthought resulting from the failure of the enterprise through their fault and indicated a total disregard of the time and effort expended by Breytspraak in trying to insure the success of the plan in compliance with their wishes and request.

It would serve no useful purpose to remand the cause for further hearing, because presumably all the oral and documentary evidence available was introduced upon the trial. Therefore the judgment of the Circuit court is reversed and judgment entered here in favor of defendant and against plaintiffs for costs.

JUDGMENT REVERSED AND JUDGMENT HERE IN FAVOR OF DEFENDANT.

Scanlan and Sullivan, JJ., concur.

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Seemlan and Sullivan, JU., concur.

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EDWARD S. GILLESPIE,
Plaintiff-Appellee,

V.

EVIE GILLESPIE, Incompetent,
Defendant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

329 I.A. 582

On Appeal of HINDA SAMUEIS, Guardian ad Litem, Appellant.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On August 27, 1943 Edward S. Gillespie filed a complaint for divorce against the defendant Evie Gillespie, charging desertion without any reasonable cause for the space of one year and upwards. A suggestion of insanity having been filed by her father and next friend, Hinda Samuels, defendant's aunt, was appointed guardian ad litem and William H. Temple was designated as her attorney. Subsequently, on June 28, 1944, plaintiff filed an amended complaint to annul his marriage to defendant, charging that on December 29, 1927, the day of the purported marriage, defendant was an insane person and incapable of entering into a valid marriage contract. Trial of the issues before the chancellor without a jury resulted in the entry of a decree formulated in harmony with the prayer of the amended complaint, from which the guardian ad litem has taken an appeal.

When the parties were married in Chicago on December 29, 1927, defendant was approximately 21 years of age. She had attended Wilberforce University in Ohio from 1918 to 1921, having gone there from her home in Vicksburg, Mississippi. After leaving Wilberforce University she came to Chicago, attended Bryant & Stratton business college, where she studied shorthand and typewriting, and subsequently, prior

EDWARD S. GILLESPIN, Plaintir- ppelles,

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EVIE GIBLESFIE, Incompatent, Defendint.

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plaint for diverse archest to distantint -vis cilies is plaint for diverse archest to distantint for diverse archest to any reader action of the space of one year and questus. A suggestion of industry having been filed by her father and next friend, inchantly been filed by her father and next friend, inch and hillien i. Temple was designated as her at order. The sequently, on function in the intringe so a female, in that complaint to annul his matriage so a female, in raise, of ordered as a valid matriage contract. This is purposed. Another a valid matriage contract. This of the issues before the charcellor without a jury results in the order of a decree formulated in hermony with the purpor of the same decree formulated in hermony with the proper of the same decree formulated in hermony with the proper of the same and appeal.

When the perties were mirried in Ohiongo on December 29, 1927, defendant was up roximately 21 years of 1880, the had attended Wilberforce University in Chio from 1913 to 1921, having gone there from her home in Vicksburg, Hississippi. After leaving Wilberforce University she came to Chicago, attended Bryant & Stratton business college, where she studied shorthand and typewriting, and subsequently, prior

to her marriage, was engaged in secretarial work for Carson Piric Scott & Co. and Sears Roebuck & Co. After her marriage she was employed for a short time at the Lincoln State Bank in Chicago.

Early in 1929 she returned to Vicksburg and in March of that year she was taken by her father, Arthur J. Eilbatt, and her husband, Edward S. Gillespie, from Vicksburg to New Orleans, Louisiana for examination by a mental expert. after she remained in Vicksburg with her parents until August 1929, at which time plaintiff went to Vicksburg to get her. and drove her back to Chicago with Hinda Samuels and her husband. Following defendant's return to Chicago, she was treated at an institution in Hinsdale, Illinois for a mental condition, and within a year thereafter, on May 28, 1930, she was adjudicated insane by the County court of Cook County. Her disease was designated as dementia praecex, she was committed to the Kankakee State Hospital for the Insane, and remained there from May 28, 1930 until February 25, 1931, at which time she was transferred to the Manteno State Hospital at Manteno, Illinois. Following a 90-day parole, she was discharged as improved on July 18, 1931, but has never been restored to sanity by any order of court, and admittedly is now and has been since May 28, 1930 an insane person. After a painstaking trial, during which some ten witnesses testified on behalf of plaintiff and six others on behalf of defendant, the chancellor found that defendant was an insane person on the date of her marriage, December 29, 1927, and at that time did not have the mental capacity to enter into a valid marriage.

The principal ground urged for reversal is that the decree is contrary to the manifest weight of the evidence. The question of fact involved is whether defendant had

to her marriage, was ougaged in necreterial work for Carson Piric Jost P. 20. and Deers Foedwak & 20. After her marriage she was employed for a short time at the Linsolm Atote Bank in Chicago.

Early in 1929 sie returned to Vicksburg and in March of that year she was taken by her father, orthur J. Tilbett, and her husband, Eduard S. Cillespie, from Viskeburg to How Orleans, Louisiana for examination by a mental expert. Thereafter she remained in Vickelians with her services until ' worst 1929, at which time plaintain went to Wick burg to get her, and drove her book to to the condition at the second send several and there husband. Following defendant's roturn to Miler's, she was Lotron . To? alocalli .efabania ni noivutitani na ta betaert condition, and within a grear thereafter, on they 28, 1930, she was aljudiented insang by the lounty court of dook Tounty. Her disease was designated as demantia present, also was committed to the Kankanco toto compiled for the magne, and remained there from May 23, 1930 until Petraumy 25, 1931, at which time she was transferred to the lanteau state 'ospital at Manteno, Illinois, Tolloving a 90-dey parole, she was discharged as improved on July 18, 1931, but has never been restored to sinity by any order of court, and admittedly is now and has been since they 28, 1930 an insane person. Ifter a painstaking trial, during which seme ton wilnesses testi-Tied on behalf of plaintilf and the there on behalf of defendant, the chancellor found that defendent was an insene person on the date of her marriage, December 29, 1927, and at that time did not have the mental espacity to enter into a valid marriage.

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enter into a valid marriage contract. Without reviewing in detail the testimony of the numerous witnesses embraced within a record of almost 400 pages, the substance of their testimony and the essential matters with respect to which they testified, may be summarized as follows: B. M. Santos, a physician, but not a psychiatrist, called on behalf of plaintiff, testified that he had examined defendant in 1929 or 1930, found her insane and that he signed the necessary papers for her commitment to the Kankakee State Hospital. His finding as to insanity was based upon one examination and casual social contacts had with defendant over a six or eight-month period some two years after her marriage, during which he noticed that she acted reticent and uncooperative.

Several lay witnesses, including W. Ellis Stewart,
Anna Pitman, Inez M. Dickerson and Edreaner Gillespie, who
either resided in the same building as defendant, or had been
her friends prior to the marriage, or had known her during
her childhood, or lived in the immediate neighborhood where
she resided, and had frequent opportunity to observe her and
converse with her, gave it as their opinion that she was
insane on December 29, 1927. Their conclusions were predieated upon observations of and conversations with defendant
during her engagement and after her marriage, and some of
the observations antedated both events, and the opinions of
the witnesses generally dealt with her peculiarly moody
manner, reticence, distraction when engaged in conversation,
imaginary ailments, her apparently dazed condition, and
general demeaner.

Inez M. Dickerson, who in 1927 lived next door to the Gillespies, testified that before the marriage she had noticed that defendant had a peculiar look in her eyes, that sufficient mental capacity on the day of her marriage to center into a valid marriage contract. Enthout reviewing in detail the testimeny of the numerous withesses embraced within a record of almost 400 pages, the substance of their testimeny and the assential matters with respect to which they testified, may be summarised a follows: D. M. Santos, a physician, but not a poychiatrist, called on behalf of plaintiff, testified that he had exumined desendant in 1929 or 1930, found her insane and that he signed the necessary papers for her consituent to the Zankakes state hospital. His finding as to insanity was based upon one examination and casual social contacts had with affect over a six or eight-month period some two years after her marriage, during eight-month period some two years after har marriage, during which he noticed that she acted rethernt and uncopporative.

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Inez M. Dickerson, who in 1927 lived next door to the Cillespies, testified that before the marriage she had noticed that defendant had a peculiar lock in her eyes, that they shifted, and that in conversation she could not stay on one subject.

Edmeaner Gillespie, plaintiff's mother, testified that she first met defendant in 1927, several months before her marriage, and saw her frequently thereafter at gatherings and at the witness' home; that she frequently had conversations with her and discussed the impending marriage: that she was present at the ceremony and talked to her on that day: that plaintiff and defendant stayed at her home the night of the wedding and lived there for some time thereafter; that defendant appeared to be very moody and "always imagined there was something wrong with her. \* \* \* she thought she had different ailments. In conversations she seemed in a daze. I asked her would she understand me, she would say yes. We would just let it drop. I would notice she didn't seem to grasp what I was talking about. \* \* \* The night of the marriage I had quite a time trying to persuade her to go to her husband. She gave no reason. She said she did not want to. I tried to make her understand her obligations of marriage. She didn't seem to understand that. I had quite a time after the marriage. She began to talk about these ailments again and that she was going to leave him. begged and pleaded with her here. She said, 'I don't know, I don't want to be married to him or any other man. ' After that she would tell me she was going to kill him and kill herself. This was a week after the marriage. \* \* \* She seemed moody and worried. I asked her what was wrong. did not tell my son his wife talked about killing. impressed me, I didn't speak to my son, I was afraid of what I saw. I tried to keep it for a period of months. When I did, he went to pieces. He told me he saw it, and was hoping against hope what he saw wasn't true."

timey soft ted, and that in converseting she could not stay on one subject.

Windaner tilospie, platubiff's nother, testified time she first met defend mt in 1927, seren 1 months before her marriage, and and her firecishily thoughten at natherdams and at the ditness; that the fact mathy had convergetions with her and allowed the lap main; marriages that she was present at the coremny cal talked to her on that day; that plaintiff and dof about the to too bome the might of the endian and live there for some time thereafter: benigani ayamist , ra , about your of of lemange indum tob ind there was so-thing, on, this hope a saw each had different cill nits. In convers tions she acemed in a dano. I naked her would plie materature me, she would say yes. We would just in it drop, I would notice she dienth seem to grasp that I was talling about, the The might of the intringe I led ddite a time trying to persuale her to vo to her hashend. whe give no reason, the sat the did not of is amply split where instruction and control I to it was the ofin, but I , Jan't backer one of most finds one .sgalar on a time after the mirriage, which again to this most those cilments again and that size was joing to lauve him. I begged and pleaded with her here, the said, 'I jon't know, rotta timen waite you so min of a harm od of them I'mon I that has and this or paker our read on this ite and hill hersolf. This was a wook after the marriage. \* \* \* She seemed moody and worried. I asked her what has wrong. 31 . gatiliti juode besist ehim ahi maa ya fist jon bib impressed me, I didn't speak to my son, I was afraid of what I saw. I tried to keep it for a period of months. When I did, he went to pieces: He told me he saw it, and ". surid i nes was en i danw egon danisga galgon saw

W. Ellis Stewart, secretary of the Supreme Liberty Life Insurance Company, testified that for about three years preceding the marriage he lived in the same apartment building as Gillespie; that he had known defendant for several months before the marriage and saw her at least once or twice a week prior to December 29. 1927; that he occasionally had conversations with her, once at his office about two or three months before the marriage; that on one of these occasions he congratulated her upon coming into the Gillespie family, and that "she practically said nothing, just turned away without comment, not as if she did not understand it, but as if she ignored it." Testifying further. the witness said: "My opinion [that she was insane] is based upon the [above] conversation I had with her the two or three days before the wedding. Her action was not the action of a normal person. \* \* \* I arrived at the opinion she was insane after the marriage from the things that happened after her marriage. She did many acts of an insane person. I traced it back to this incident that occurred before."

Anna Pitman knew defendant in Vicksburg, Mississippi before she came to Chicago, lived several blocks from her home and saw her frequently when she was a child. Later, in 1927 and subsequently, she saw her in Chicago about once a week. She stated that as a child defendant seemed indifferent and held herself aloof from others, and that she later observed the same characteristics when she met defendant in Chicago.

William J. Johnson worked at the Lincoln State Bank, first as a messenger, then as a teller, and met defendant when she came to work there in the early part of 1929. He testified that after three or four days she said: "Mr.

T. Wills stewart, sour bury of the apreme filterty Life Insurance company, testified that for close three years preceding the marringe is lives in the same opertunet building as dileppie; that a build brown of mant for tanol to and to to a spainted wit though decition Lareves once or twice a week grier to Secarbar M. lerge Were in occasionally had convenienthous with her, one it is office smo no that jug kurer and are no od altinom sould no out thods of these occupations he congreted that agent agent terms that the Childespie standing and that "she preside illy said nothing ton bis and "is a some server on droughty your bearing start anderstand it, but as it who is more it. I a virying further, the image said: "In opinion [the che was the me] is based upon the [above] conversible of the sith her the two or water days be 'or the acadia, the action a not bis cabine aby and nothing and to be the second a well among Lammon s to benery at their agents of most equipmen out notice sensent after iner marriage. She tid tang ette o ta in marr eni utto I traced it book to Mis from the first occurry, before.

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Arma Pitzen form I for at the Vietness is a sistery to before sin came to vidence, and something and the content of the frequently than sin were a clair. Interpret in 1927 and subsectionally, and a what is a finite to be clair to both content ones. The itself of that as a child definite before that the consent of half horself theory others, and that she leter observed the same characteristics when she met defendant in Chicago.

William J. Johnson orked at the Lincoln State Bank, first as a nessenger, then as a teller, and met defendant when she came to work there in the early part of 1929. To testified that after three or four days she said: "Mr.

Johnson, I am going to leave here." Upon asking her what the trouble was, she responded: "People coming in the bank, they look at me so strange, I am afraid. I imagine somebody is always chasing me." He attempted to reassure her by telling her that "you musn't feel like that. This is a public place, as long as they don't say anything to you, everything will be all right," but the witness added: "She continued to have that strange idea. I think the next day, I took her home in my car" and she never returned to the bank.

Maud Samuel, called as a witness on behalf of defendant, gave it as her opinion that defendant was some on the day of her marriage. She had met her several years prior thereto, and had conversations with her at various times. The witness made defendant's wedding dress, talked to her while she was being fitted, and considered her a same person, and said that at a luncheon given in June 1928 by the witness, at which defendant was a guest, she seemed very happy, responded readily to questions, and acted rational. On cross-examination, the witness testified that defendant told her she hoped that news of her marriage would not appear in the papers here, but did not give any reason therefor.

June Howe testified that defendant was her best friend, that she first met her in 1922 in Chicago, and thereafter, up to the time of the marriage, she attended dances, football games, luncheons and the theater with defendant; that defendant's conversations with her were natural and normal, and she believed defendant to be same. On cross-examination, Mrs. Howe stated that defendant expressed a natural apprehension about her light complexion, and that she had been regarded as a white person by her

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Johnson, I du going to loave here, " Upon acking her what the trouble was, she responded: "Icopia coming in the bent, they look at se so strange, I am afraid. I inagine senabody is always chasing we," do ettempted to recommo her by telling her that "you mush's feel like that. This is a public, as long as they con't any curifich, to you, cougthing will be that thit," and the always adod; "Ohe continued to have that atrende ifce, I whink the neat day, I to de her home of my car' on. I whink the to the bank.

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employers and business associates. Mrs. Howe felt that "it was a normal thing for her not to want to be seen in the loop with persons of dark complexion, for fear someone would go to the place where they knew her."

Martha Gant knew defendant as a child in Vicksburg, Mississippi, and then attended Wilberforce University when defendant was a student there. Later she saw her frequently in Chicago. Based upon these associations, her opinion was that defendant was not insane. She knew that defendant passed for a white person at her work downtown, but testified that defendant had never indicated any apprehension about being followed.

Hinda Samuels, defendant's aunt and guardian ad litem. testified that defendant lived with her from 1922 until she was married, except when she visited her parents in Vicksburg: that while living with her defendant assisted with the housework, attended Bryant & Stratton business college, and later was employed at Carson Pirie Scott & Co. and Sears Roebuck & Co.; that she was present at the wedding ceremony, and that defendant responded to the questions propounded by the minister; that before the wedding she told the witness that she loved Edward and thought he would make a good husband. In 1929 the witness drove to Vicksburg in her husband's car, together with plaintiff, defendant, and the witness' daughter. While they were in Vicksburg, the Eilblatts had a reception for plaintiff. She was of the opinion that defendant was same on December 29, 1927. On cross-examination, Mrs. Samuels stated that defendant lost her mind sometime before she went to Hinsdale Sanatorium, and at that time she had apprehensions about being pursued, and recalled some conversation with her about being followed while she worked at the Lincoln State Bank.

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In addition to the lay witnesses, plaintiff adduced the testimony of two eminent psychiatrists, Drs. Alex S. Hirschfield and Harry R. Hoffman, neither of whom had examined defendant but predicated their opinions upon hypothetical questions. Both doctors were present in the court room when the evidence of many of the witnesses was being adduced, and their answers were based not only upon the testimony which they heard but upon the hypothetical questions propounded. One of the errors assigned by defendant is that the chancellor allowed plaintiff to testify, notwithstanding his incompetency under section 2, chapter 51, Ill. Rev. Stat. 1945. In support of this contention it is argued that the testimony of the two psychiatrists must be excluded because the hypothetical questions put to them were based in part upon the incompetent testimony of plaintiff. Although it is true that the hypothetical questions put to these witnesses assumed some of the facts testified to by plaintiff, nevertheless, before the conclusion of the trial, all matters and things therein contained were adduced in evidence by witnesses other than the plaintiff. We have examined the hypothetical questions propounded to the psychiatrists, and find them in all respects proper and predicated upon competent evidence embraced within the record. Both psychiatrists testified that dementia praecox was a slow insidious form of insanity that starts early in life, usually in the teens or adolescent stage of an individual's

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These observations lead to the statement of the well-known rule of law in this and other states that where a case is tried by the chancellor, his decision will not be reversed unless it is clearly and manifestly against the weight of the evidence. Elder v. Clarke, 385 III. 335; Elsasser v. Miller, 383 III. 243; West v. LePage, 381 III. 131; Sroczynski v. Schultz, 381 III. 86; Cravens v. Hubble, 375 III. 51; and Van Amburg v. Reynolds, 372 III. 317. The rule is also well established that where the evidence is conflicting, the chancellor will not be reversed unless his findings are clearly and manifestly against the weight of the evidence. Brozina v. Wanda, 387 III. 46; Jones v. Dove, 382 III. 445.

Although it appears that the chancellor permitted plaintiff to testify, the record discloses that he was fully aware of the plaintiff's incompetency as a witness, as indicated by the chancellor's statements of record, and he undoubtedly recognized that there was sufficient competent evidence besides the testimony of Edward S. Gillespie, the plaintiff, tending to show that at and before the marriage defendant was insane, because he so stated fully in the course of his rulings on defendant's motion to dismiss at the close of plaintiff's case.

At the conclusion of the trial the chancellor reviewed some of the evidence, and gave his reasons for finding that defendant was an insane person on December 29, 1927 and did not then have the mental capacity to enter into a valid marriage. He stated that among other things he was impressed by the testimony of the lay witnesses who appeared in behalf

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of defendant, but pointed out certain objective facts in the case such as defendant's treatment in Hinsdale Sanatorium within some twenty months after her marriage, her adjudication of insanity by the County court of Cook County, and the admitted fact that she was at the time of the trial insane. He stated that he had "weighed and considered the evidence in this case very carefully during the days that it has been under my consideration; and while there is much to be said in support of the contention so ably presented by defendant's counsel in behalf of the weight to be given to the testimony of the lay witnesses appearing for the defendant, \* \* \* that she was of [sound] mental capacity and was capable of entering into the marriage relationship on December 29, 1927, [nevertheless] the court has arrived at the conclusion, considering all the facts and circumstances in evidence, considering \* \* \* the nature of the mental disease known as dementia praecox, that it seems inescapable from the evidence in this case that the defendant was suffering from dementia praecox at and before the time in question, viz., December 29. 1927."

From a careful examination of the record, the conclusion is fully warranted that defendant was insane long prior to the date of her adjudication and commitment in May 1930. The only question that can fairly be said to exist is, how long that condition had existed. According to the testimony of the psychiatrists, dementia praccox usually begins during adolescence and progresses with the years. The fears and apprehensions of defendant, as testified to by some of plaintiff's lay witnesses, fortify the conclusion that her insanity may have been in its incipient stages long before her marriage, and that on the date of her marriage she did not have the mental

of defendant, but pointed out certain objective facts in the case such as defendant's treatment in Hinsdale danatorium within some twenty months after her marriage, her adjudication of instmity by the county count of Jook County, and the admitted fact that she was at the time of the trial incore. We stated that he had "weighed and considered the evidence in this case very cerefully during the days that it has been under my consideration; and while there is much to be said in support of the contention so ably proposed by defendentia counsel in behalf of the swight to be given to the testimony of the Lay affinesses an earling for the defendant, and a what -mains to elded a the threath terraphic of public of curved ing into the marriage red tionship on Decumber 29, 1907, [movertheless the court has employed of the constraint, consimering all the flots and circumstances in evidence, comcidering at the nature of the month than as known as lumntia passeout, the tot brace inescapable from the ericemus in this case that the defendant was mailwrite from demontin puredox at and b form the time in question, what, lea-wher 29, 1927."

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capacity to enter into a valid marriage contract.

For the reasons indicated, we are impelled to conclude that the findings of the chancellor who saw and heard the witnesses and gave the hearing of the case the most careful and serious consideration, are not contrary to the manifest weight of the evidence and ought not to be disturbed. Therefore, the decree of the Superior court is affirmed.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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For the reasons indicated, we are impelled to conclude that the findings of the chancelier who saw and heard the witnesses and gave the hearing of the case the most careful and serious consideration, are not contrary to the manifest weight of the evidence and ought not to be disturbed. Therefore, the decree of the Daperier court is affirmed.

PROMISSIN SILMONG

Scanlan and Sallivan, J., concur.

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LORETTA PABIS, Administratrix of the Estate of WALTER DEMBSKI, Deceased,

Appellant,

Whiterrane

V.

THOMAS J. FRIEL and CHARLES C.
RENSHAW, as Trustees, etc., et al.,
doing business as CHICAGO SURFACE
LINES,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

323 I.A. 283

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Loretta Pabis, administratrix of the estate of Walter Dembski, deceased, brought suit against defendants to recover damages for injuries to the decedent resulting in his death, alleged to have been caused through the negligence of defendants' motorman while operating one of their streets cars at the intersection of North Ashland and Milwaukee avenues in Chicago. Trial by jury resulted in a verdict of not guilty, upon which the court entered judgment, and from which plaintiff appeals.

The facts disclose that Ashland avenue runs north and south, and Milwaukee avenue is a diagonal thoroughfare running northwest and southeast, thereby forming a triangular corner at the intersection of these two streets. There are two street-car tracks running parallelalong Ashland avenue. On the northwest corner of Milwaukee and Ashland avenues is a building occupied by Continental Clothing Company, and on the northeast corner of the intersection, directly opposite the building occupied by Continental Clothing Company, is a four-story brick building known as 1229 Ashland avenue.

Limediately adjacent to the southbound street-car track and near the northwest corner is a safety island or loading platform, used by persons boarding and alighting from

LORRETA PARES, Administratrix of the Listate of WALFER DECIMITY, Peseased,

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THOMAS J. FEIGL and CHARLES C. EMPLIAN, as Trustess, etc., et al., doing business as All Mad BURF ON LIMES, Expellers.

APPELL WHOM SUPPRICE OF APPELLANCE.

ER. PRESIDENG JUDIEDA PRIEND DELIVERD LAU U LATON GE TER COURT.

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Inmediately adjacent to the southbound street-car track and mear the northwest corner is a safety island or loading

platform, used by persons boarding and alighting from

southbound cars. This safety island is about six or eight inches above the street level, 103 feet long and four feet six inches wide. The northerly crosswalk of Milwaukee avenue, if extended, would be south of and adjoining the southerly corner of the safety island. On the west sidewalk of Ashland avenue, near the curb and 37 feet south of the north end of the safety island, is an electrically operated "stop" and "go" traffic signal light. This light is 66 feet north of the south end of the island.

In mid-afternoon of May 26, 1943, plaintiff's intestate, then 56 or 58 years of age, in good health and in full possession of his mental faculties, was in the act of crossing Ashland avenue from the west to the east side of the street near the southerly end of the safety island, or at a point not more than ten or fifteen feet north of the south end of the island, being directly opposite the building on the northeast corner of the intersection, known as 1229 Ashland avenue. A street car approaching from the north had the red light, which required all north and southbound traffic to stop. Plaintiff contends, and adduced evidence to show, that it was customary for all cars to stop at least 30 feet north of the south end of the safety island, and it is contended that the street car proceeded south along almost the full length of the safety island beyond the regular signal light, and struck the deceased just after he had started moving in an easterly direction to cross Ashland avenue, causing injuries which resulted in his death almost immediately thereafter. Defendants made a motion for a directed verdict on the theory that the evidence justified the conclusion that decedent was not in the exercise of care for his own safety, and that his injuries resulted from his own negligenes. They

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Matthew O'Connell, a police officer stationed at the intersection in question, testified that the stop light was north of the point where the decedent fell, indicating that the street car had passed beyond the traffic signal, and he stated that from time to time prior to the accident he had observed people walking across Ashland avenue at any point south of the traffic light; that he did not know how many people per day crossed in that manner, "but I know a lot of people cross the street that way." Another witness. Albert L. Hronek, a salesman for the Continental Clothing Company, which is located on the northwest corner of the intersection, testified that people crossing Ashland avenue from west to east at places south of the traffic signal "pass any place south of the traffic signal. \* \* \* I see a great many of them from time to time crossing from the west side of Ashland avenue outside the white lines. That has been true for some period of time before the accident. That

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was their habit 6 or 7 months or longer before the accident."

It was competent for plaintiff to introduce, and for the court to receive, evidence of the custom, to which two or more of the witnesses testified, and the mere fact that plaintiff's intestate attempted to cross the track in front of the car which was only a few feet away but which had slowed down to almost a stop, would not of itself prove that he was guilty of contributory negligence, because he may have depended upon the custom and the traffic signal showing red, which required all north and southbound traffic to halt. Under the circumstances we think that it was a question of fact for the jury to determine whether deceased was in the exercise of due care for his own safety, and that the court would not have been justified in directing a verdict holding that he was negligent as a matter of law and that his administratrix was therefore precluded from recovering,

The case was allowed to go to the jury, which evidently reached the conclusion, under the instructions tendered by defendants and given by the court, that defendants were not guilty. Plaintiff contends that the verdict was produced by the repetitious use in seven of the seventeen instructions tendered by defendants of the phrases "the plaintiff cannot recover," "you should find the defendants not guilty," and other phrases of like import, thereby conveying to the jury the impression that the court was opposed to the plaintiff's theory of the case. We have examined the instructions, and find that they are subject to the criticism which the plaintiff makes. We had occasion, in Gulich v. Ewing, 318 Ill. App. 506, where the facts were sharply in conflict, to reverse the judgment and remand the cause for retrial for the sole reason that the instructions given were repetitious, prejudicial,

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It we competent for plaintiff to intro use, and for the court of reseive, sydding of the sastom, to which two or more of the withseces testified, in the investible the withseces the track that plant plaintiff is integrable attempt to eross an arrank in front of the car which was only a few fort war into which had aloned down to almost a ctop, roul, not of intelf prove that he was guilty of so almost a ctop, roul, not of intelf prove that he was guilty of so almost a ctop, roul, not of intelf prove that depended upon the engion and two tires is algued alone the carties of the depended upon the engion and two tires is a signal chording roul the gray to determine that is not the first our tire of the form of the tire of the form of the chirt of the first our troubs and have been furtified in the chirty, and the first our troubs not have been functified in the chirty are of the chirt of the chirty and the first our first that

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and therefore erroneous. In that case nine of the seventeen instructions tendered by defendant and given by the court, concluded with words of similar import, and after reviewing the decisions, in many of which the courts had repeatedly condemned the practice of needlessly concluding numerous instructions with phrases of the character indicated and had entered orders of reversal in a number of them on that ground alone, we pointed out that the vice of such a charge lies in the fact that it is calculated to impress the jury with the thought that the court was against the plaintiff on the question of fact, and the jury might easily be misled to believe that in the opinion of the court they should find for the defendant. In Nelson v. Chicago City Railway Co., 163 Ill. App. 98, the court criticized the practice by saying: "This is only another way of emphasizing the words 'not guilty' and is as effective, if not more so, as printing the words in large type - a practice condemned in Elwood v. Chicago City Ry., 90 Ill. App. 397." In Wood v. I. C. R. R. Co., 185 Ill. App. 180, six of the fifteen instructions offered by defendant and given, concluded with the charge that a verdict of "not guilty" should be returned. In these fifteen instructions certain principles of law favorable to the defendant were, by many frequent repetitions, unduly emphasized, and were held to have been brought too prominently to the attention of the jury. The court there reached the conclusion that the giving of these instructions required a reversal, and remanded the case for retrial. A similar situation existed in Cohen v. Weinstein. 231 Ill. App. 84; Daubach v. Drake Hotel Co., 243 Ill. App. 298; Williams v. Stearns, 256 Ill. App. 425; City of Lake Forest v. Janowitz, 295 Ill. App. 289; and Pillow v. Long, 299 Ill. App. 542. As stated in the Gulich case, such a practice is undoubtedly

and therefore orronous. In that case nine of the seventeen instructions tendered by defendant and given by the court, concluded with words of similar import, and siter reviewing the decisions, in many of which the courts had repostedly conderned the practice of new lessly concluding municus instructions with phrases of the elements in Hespelan in Lad brucan finit no main to reduce a mi larger to propose for the alone, we pointed ont that the vice of each to there the the the that that it is calculated to improse the jury with the and in a literature and tarkers are tures and test thirt times in question of fact, one to jury might reality to mixind to believe that in the opinion of the sense they short that for the defendant. In Telson v. Jacos o Mity seilery 10. 163 III. .pp. 98, the court emitted od the practice by saying: "This is only another may of endroising il worde 'not guilty' and is as affective, is not need so, as princing the words in large type - a practice contenued in all ood v. Unicego City Py., 90 Mi. app. 299." In oud v. I. G. a. I. Go., 135 III. pp. 130, sim of the filter ministructions offered by defend at an item, tendinded till the charge that a verdict of "not wilty" should be returned. In the co fifteen instructions contain minimizes of his lavoreties to the defendant were, by many frequent repetitions, unduly emphasized, and were held to have been brought too promineartly to the attention of the jury. The court flore reached the conclusion that the giving of these instructions required a reversal, and remended the case for netrial. . similar situation existed in Cohen v. Leinstein, Lil Ill. App. (4; Danbuch v. Der be Notel Co., CA3 III. pp. 298; Williams v. Stearns, 256 Ill. op. 425; City of Jake Porest v. Janowitz. 295 Ill. App. 269; and Pillow V. Long, 299 Ill. App. 542. As stated in the Gulich case, such a practice is undoubtedly

misleading to the jury and prejudicial to plaintiff's cause, because to repeat constantly and needlessly the charge "then you should find the defendant not guilty" or words to that effect, suggests to the jury that on the question of fact the court favors the defendant. When jurors are examined as to their qualifications, they are committed to the rule that they will follow the law as charged by the court, and where the court repeatedly tells them to find the defendant not guilty, it is easy to understand that they may be misled into believing that the court is charging them, as a matter of law, to find for the defendant.

If this were a case where the evidence would warrant the conclusion that plaintiff's intestate was guilty of negligence, as a matter of law, in failing to exercise due care for his own safety, defendants! argument that "under the evidence, no other result could reasonably have been expected, had the instructions complained of not been given or that a different result could reasonably be expected on another trial, " would merit careful consideration, but since we hold that the question whether plaintiff's intestate was in the exercise of due care, was properly one for the jury, in view of the location of the traffic light, the fact that the car passed beyond it, and the custom of crossing the intersection south of the light, as testified to by several witnesses, it was important that the instructions should not be misleading or prejudicial and should be free from the unwarranted and frequent repetitions of the phrases complained of.

For the reasons indicated, the judgment of the Superior court is reversed and the cause is remanded for retrial under proper instructions.

JUDGMENT REVERSED AND CAUSE REMANDED FOR RETRIAL WITH DIRECTIONS. Scanlan and Sullivan, JJ., concur.

misleading to the jury and projected to phointiff's cause, because to repeat tonstantly and needlassi; the charge 'then you should find the de 'endead not anility' or words to that effect, suggests to the jury that of the question of fact the court favors the defeatant. In a javers are examined as to their qualifyections, where we constitute that they will folto. The law as diraged by the court, and where the court repeatedly table than to find the defendant not guilty, it is easy to unioner method that the defendant into believing what the court is an entering the fact of the fact. Then, as a matter into believing what the court is an entering them, as a matter

If this wore a case where the evil ne call a read the the conclusion that plantifils intent to make milty of negligence, as a action of law, in a liting to extraise due care for his own affect, welsafints! argument that "under the evidence, so other soult soult sensbly bove been expected, had the sambiractions completes, of not been given or that a lifferent result could resembly in superted on another trial, " would medit careful consideration, but since we hold that the cuestion in their alministic's intestate was in the exercise of due care, was proportly one for the jury, in view of the location of the truffic light, the fact that the cor passed beyond it, and the outten of crossing the intersection south of the light, as tastified to by several witnesses, it was important that the instructions should not be misleding or prejudicial and should be free aren the unvarranted and frequent repetitions of the phrases complained .20

For the reasons indicated, the judgment of the Superior court is reversed and the cause is remanded for retrict under proper instructions.

UDICATE SUVERED AND LAUSE TEMPHORE.

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PETER VAN BRUSSEL,

Appellee,

V.

ROBERT BARTLETT, d/b/a Robert Bartlett Realty Company,

Appellant.

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APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

327 I.A. 583

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant was engaged in the real estate business in Palos Heights, Illinois, where he maintained a barn and a team of horses. Plaintiff was a blacksmith, engaged in going to farms and riding stables for the purpose of shoeing horses. On June 22, 1943, in response to a telephone request, he called at defendant's barn to shoe a team of horses, and as he entered the stall of one of the horses, he was kicked and severely injured. Trial by jury resulted in a verdict and judgment for \$1750.00, from which defendant appeals. No question is raised as to the amount of the verdict or as to any of the instructions. The trial was fairly conducted, and the principal grounds urged for reversal are that plaintiff was guilty of contributory negligence, that plaintiff having full knowledge over a period of five years, of the horses that he was about to shoe, assumed any risk coincident with his work, and that in view of the uncontroverted testimony of plaintiff and all of defendant's witnesses that at no time prior to the occurrence had the horse shown any vicious propensities, there was no duty on defendant to warn anybody of danger, and therefore the court should have directed a verdict for defendant at the close of plaintiff's case.

The salient evidence adduced upon the hearing may be summarized as follows. Plaintiff testified that he was requested by defendant to come to his farm to shoe his two horses; that when he arrived there he saw the foreman,

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MR. PHARICINA FIRITIVE ET INT DELVERNO THE RELIGIO OF THE COFFEE.

Defondant was engaged in the real estate basiness in Pulos Molghis, Illinois, hore no suincined a burn end u team of Lurses. Philintifit was a blackeriable, engaged in roting to farms and riding atahlas for the partone of chosing hordes. Un June 12, 1941, in response to a telophone request, he ealted the search form to show a found of manufacts and called he entered the whell of the impres, in was sicked and severely injured. Arich by jury resulted in a vertict end ju gment for Margo. Out thich dost adams a gents. To question is raised as to the assess of the variant or as to any of the instractions. The tell 1 he filly contacted, and This mining fait one framewor to began arms of islicating off was guilty of centributed; negligher, that plaintiff having full knowledge over a posion of five year, of the homose that he was about to shoe, assanced any with reind and with his work, and that in view of the amount overtal tentiment of plaintiff and all of defend out's witnesses that it no time prior to the eccurrence had the herse shown ing victous propensities, there was no duty on defendent to warm smybody of danger, and therefore the court should have directed a verdict for defendant at the close of plaintiff's esse,

The salient evidence adduced upon the hearing may be summarised as follows, Flaintiff testified that he was requested by desendant to come to his farm to shoe his two horses; that when he arrived there he saw the foreman,

Jousma, who showed him where the horses were, and when plaintiff asked him if he would go along, Jousma said that it was not necessary, "the horses were all right," that "there was a man there who would help me, so I went over to the barn with my helper." When he got to the barn he saw Edward Jacobs, who had charge of the barn and horses on defendant's farm. and told him that he and his helper had come to shoe the horses: that Jacobs said "all right," and then walked into the barn and got one horse, "and I walked in to get the other horse \* \* \*. could not say how he approached the one he was leading out because when I walked in, he was in front of that horse, untying him. I approached my horse as I always do, from the rear. As soon as I walked behind him, he kicked with both feet, not once, but several times and knocked me on the doors." Plaintiff sustained a broken arm and other injuries. He was first taken to a doctor in Blue Island, then to a hospital in Harvey, where K-rays disclosed a fractured arm. He remained at the hospital about three days, and had a cast on his arm from the date of the injury until August 4, when it was placed in a sling. His right leg was bruised so that he had difficulty in walking for several weeks, and there was undisputed evidence that he had not regained the full use of his arm subsequent to the accident.

Walter Witt, called as a witness on behalf of plaintiff, testified that he had conducted a riding stable in Palos Park since 1931; that he cut hay near defendant's barn, used to keep his machinery near the barn where the accident occurred, and on occasions walked over to the barn where the horses were kept; that in June or July of 1942 he talked with Jacobs, who told him "to be careful of the horses, that they were a little mean."

Jacobs, testifying on behalf of defendant, stated that before he went into the barn he told plaintiff "not to go in there,

Journa, the phoved him where the horses here, in them plaintiff asked him if he would to clone, Journa siff that it was asm suchi that ".t. in Ills more search wit" greezesen ton a mun there als would help as, so I went ever to the bern with my holper," has he got to the barn he saw idward Jacobs, who had charge of the been and horses on theorem's farm, and old him that he and lais helder had come to shoo the lorger; that for int made off ofth bedder need in ". fright list bice edocat one house, "and I walked in to get the other horse will. I -od two gaibbol asw oil one obt behavorige of wor the ton bisos cause when I welled in, he was in front of that horse, untying him. I approcained my losses as I all aye do, from the rear, as soon as I walked be wind bile, inc lasked with both feet, not once, but several times and imported to the loans, " whatethir surfained a broken and other injuries. He was first baken to a doctor in Thue Island, then to a bouldful in Harvey, where .- reys displesed freebared and. He remined et ble hospital about three days, and had a was on his and from the date of the injury watil to ust 4, when it was placed in a mi wilberial and end that on beathful new get dilite ail .gmile welking for several weeks, and there was unliquied evidence they each unit regulated the fall use of his aim subsequent to the accident.

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Jacobs, testifying on behalf of defendant, stated that be-

fore he went into the barn he told plaintiff "not to go in there.

\*\*\* I did not tell him why I did not want him to go in. There was nothing else in the barn, but these two horses." Jacobs testified that the horses were in separate stalls which were net accessible through the front, but had openings from the front through which the horses could be fed. The day before the accident Jacobs had taken the horse which injured plaintiff, out of his stall, and he stated that "when I took him out \*\*\*, I untied him from the front, from the next stall. That is the way I was told to do it and that is the way I did it. \*\*\* I know that the usual way of untying a horse is from the rear. That is the way I always did it when I was on the farm, but this particular horse, they told me to untie from the front. \*\*\* I told Van [plaintiff] not to go into the barn. I told him not to go into the barn, because Mr. Brown told me not to leave anybody in the barn. Mr. Brown is manager of the farm. I told Witt or anybody else that came there. I told everybody to stay out of the barn." On recross examination plaintiff's counsel propounded the following questions to, and received the following answers from, Jacobs: "Q. Isn't it a fact the order was issued because this horse was wild and you did not want anybody to get kicked? A. It was on their own good behavior. They wouldn't be kicked." When asked to explain his answer, the witness replied: "Well, if you were on good behavior they wouldn't kick." Further recress examination was as follows: "Q. That is, if you would go and unlessen them from the front, that particular one? A. Unloosen them from - you can't get in by the fraent to untie them. Q. Did you untie them from the front? A. Yes, from the next stall."

It further appears from the record that when plaintiff was called in rebuttal, he denied Jacobs' statement that he had told plaintiff not to go into the barn, saying "He did not make any such statement that day. He did not say anything. I told

erem at os of min than ton bib I who min flet fon bib I were was nothing else in the barn, but these two horses," Jacobs ever delike allate etarages mi even secret edd tadt beilitest not accessible through the front, but had openings from the front through which the houses could be fed. The five before -mind berning dother error one maket bad adoubt institute the tiff, out of his stall, and he state that there I took him out were I untied him from the front, from the mark still. that is the way I was told to do it and that is the way I aid it, with I know that the usual way of unitying a house is from the rone. That is the way I always did it when I was on the farm, but this particular horso, they told me to write from the front. wer I told Van [plaintiff] not to go into the barn. I told him not to go into the larm, browned it. Woom told me not to leave saybody in the born. In. Seven is manger of the fram, T told Witt or anybody else that ease the torro. I teld everylody to stay out of the barn." On recross exactivation plaintiff's counsel prepauded the following questions to, and received the following answers from, Jecober ". Isn't it a flot the order was they for ith wo, in, iff, ask error shift saused bounct asw body to get kicked? A. It was on their over good belevior, whey worldn't be Micked." Then caked to explain his answer, the witness replied: "Well, if you were on good behavior they wouldn't blok." Further recross examination was as follows: "Q. That is, if you would go and unlcosen them from the front, that particular one? A. Unloosen them from - you cen't get in by the fraont to untile them. Q. Did you untile them from the front? 4. Hes, from the next stall."

It further appears from the record that when plaintiff was called in rebuttal, he denied Jacobs' statement that he had told plaintiff not to go into the bern, saying "He did not make any such statement that day. He did not say anything. I told

him that I came there to shoe the horse and he said all right. That is all that was said. He walked into the barn first and I walked after him." On cross-examination plaintiff testified that on prior occasions, when he had gone to defendant's farm to shoe these horses, one of the men employed on the farm or in charge of the barn "brought the horses out to me to shoe outside \*\*\*. I never shod any of them in the barn and whoever the man was that was in charge of the horses, always brought them out until the day of the accident." It likewise appears from plaintiff's testimony that on prior occasions he did not have a helper with him as he did on the day in question, that men on the farm helped him shoe the horses, and that the reason he accompanied Jacobs into the barn on the day in question was that the hour was growing late and he wanted to bring both horses out at the same time so that he and his helper could finish the job before dark.

bound to exercise care to avoid being injured by domestic animals not naturally dangerous, without notice of the vicious tendencies of the particular animal, and that whether or not the animal had theretofore displayed vicious tendencies was a question of fact for the jury. Burke v. Daley, 32 Ill. App. 326; Hammond v. Melton, 42 Ill. App. 186; Papszycki v. Gurka, 198 Ill. App. 507; and Rose v. Morton, 204 Ill. App. 108. In the light of these decisions it was a question of fact for the jury to determine whether defendant knew that the horse which injured plaintiff should have been apprised, and against which defendant was duty bound to afford plaintiff proper protection.

Thomas Howard, one of defendant's witnesses, raised and trained the horse in question on his ferm in Iowa in 1936, and kept it there until 1939, when he sold it to Bartlett. The next

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him that I came there to shoe the horse and he said all right. That is all that was said. He walked into the term first and I walled after him." On cross-emember of plaintiff testified that on prior occasions, what he indicent to desentant's firm to shor these herres, the true employed on the form or in charge of the burn throught the herses was to see to that entailed mer of the transmission of the middle to the deven I . For Tag that the la sir nor of the horses, airers brought then out and it is dry of its costs mit. The intervals the graph from plain-- Island a syrif for the call had a look a land a for the first with the or this inter of a line on the day in the thing on the and a the -mospe of row, a new a little poor of all and this begins even penied of coop linib the same on the day in emercial . ... tint the the two accordanted judge of ladinary on land of all pulsary one enoch dot one faint the color region will the out this . built one's edt with an eroled

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Thomas Howard, one of defendant's witnesses, raised and trained the horse in question on his farm in lowe in 1936, and kept it there until 1939, when he sold it to Partlett. The next

time the witness saw it was in 1944 on defendant's farm, and he stated that during the time the horse was under his observation he never saw it do "anything mean or vicious or kick or have any trouble with him of any kind." A similar situation arose in Nau v. Standard Oil Co., 154 Ill. App. 421, where a large number of witnesses who had known the animal there in question before it was purchased by appellant, tostified that it was not in the habit of kicking, but the court answered this contention by saying that "it does not follow from this that the preponderance of the evidence is, that at the time appelloe was injured the animal was not vicious. She may not have been vicious when being worked on the farm, or during the brief time that she was in the hands of dealers, and may have shown viciousness after appellant bought her and she was placed in different surroundings. Whether or not the animal was vicious was a question of fact for the jury and it was within their province to determine, where and with whom, the preponderance of the evidence lay." In this proceeding Howard had not seen the horse which injured plaintiff, for several years, and there is evidence that during the interim several different persons drove and handled the horse on defendant's farm; the implication is that improper handling by any of these witnesses may have produced its viciousness.

The fact that plaintiff had previously shed this horse over a period of five years, would not indicate that he assumed any risk coincident with his work, unless he knew that the horse had vicious tendencies, and there is no evidence to support any such contention. On other occasions the horses were led from the barn by defendant's employees, and were shed outside without any difficulty. Nor is there any basis for the contention that the court should have directed a verdict for the defendant at the close of plaintiff's case. The controverted question whether this horse had previously displayed any vicious tendencies known

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to defendant, was a matter for the jury to determine, and the question of contributory negligence does not enter into the case because under the decisions heretofore cited, persons are not bound to exercise care to avoid being injured by domestic animals not naturally dangerous unless they have notice of the vicious tendencies of the particular animal.

The case was fairly tried, and therefore the judgment of the Circuit court should be and it is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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Sornian and Dullivan, J.T., concur.

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PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES ROACH et al., Appellees,

V.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

ROBERT J. DUNHAM, President Chicago Park District, et al., Appellants.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This proceeding in mandamus was instituted on October 1, 1942 by James Roach and six others to compel the Chicago Park District and its appropriate officials to recognize the civil service status of plaintiffs and to certify and appoint them to designated positions in the classified civil service of said Chicago Park District. Thereafter on December 18, 1942 two others were allowed to intervene as co-plaintiffs. The cause was tried on the complaints filed by the original plaintiffs and the intervenors, defendants answers thereto and a stipulation of facts. A writ of mandamus was awarded by the trial court and defendants appeal.

The Chicago Park District came into existence May 1, 1934 as the result of the consolidation of twenty-two independent park districts whose existence was merged in that of the Chicago Park District. Three of these independent park districts - West Park, South Park and Lincoln Park - were operating prior to the consolidation under the Park Civil Service Act (par. 86a, chap. 24-1/2, Ill. Rev. Stat. 1943). At the time of the consolidation all of the plaintiffs herein were temporary employees of either the West Park or Lincoln Park, both civil service park districts. All of the plaintiffs claim that they were entitled to the status of civil service employees under the Park Civil

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PROPER OF THE STATE OF TELIMOTS, or rel. Jelmo Rollon et al., appellees,

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HR. JUSTICH SULLIVAN DELIGERA EEN OEHEDE GE TET DOUAF.

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All of the plaintiffs claim that they were entitled to the status of civil service employees under the Park Civil

Service Act (par. 333.14, sec. 14, chap. 105, Ill. Rev. Stat. 1943). In other words they contend that by virtue of the previsions of said Act they became employees of the classified civil service of the new Chicago Park District on May 1, 1934, when the consolidation took effect, having been temporary employees of the aforementioned superseded park districts prior to and on said date. A like contention made in behalf of plaintiffs similarly situated, who were temporary employees service of various non-civil/park districts which were superseded by the Chicago Park District, was upheld by the First Division of this court in People ex rel. Kelly v. Dunham, 313 Ill. App. 18. However, in People ex rel. Fox v. Dunham, 326 Ill. App. 562 (leave to appeal denied by the Supreme court), decided by the same division of this court on October 15, 1945, it was said at pp. 564, 565, 566:

Dunham, 313 III. App. 18, is decisive of this case. We there considered these statutes and held that the employees of the non-civil service independent park districts at the time of the consolidation became entitled to recognition by the Chicago Park District as civil service employees. The Statute of Limitations was not pleaded there [People ex rel. Kelly v. Dunham, 313 III. App. 18] by the defendants, and the facts as to the issue of laches were entirely different. By the terms of the consolidation statute the Chicago Park District was to become effective May 1, 1934. The validity of the Act was apparently deemed doubtful by all parties. It was determined to be legal and valid by a decision of the Supreme Court in People v. Kelly, 357 III. 408. The opinion in that case (by a divided court) was filed in the Supreme Court August 23, 1934; rehearing was denied October 11, 1934. Up to about November 15 of that year the independent parks continued to operate, apparently with the co-operation, in part, and consent of the Chicago park commissioners and the acquiescence of everybody.

"From the commencement of their administration of the park district the commissioners and its civil service board have contended plaintiffs were not entitled to the status of civil service employees under the statute.

"This suit, as already stated, was not filed until August 7, 1942. Defendants contend (and in the trial court pleaded as a defense) that the actions were barred by the

"The plaintiffs alsim that second on rel lally v. Dunyan, 318 "11. pt. 1. is decided of the onseigned these sociation in the organization of the non-civil service independent activities of the fine of the consoliuation because the organization to the chilage Park biderials as elvil as vice decided of the the Chilage Park biderials as elvil as vice decided of the Lander of Timitetians was not leaded of the conference of the chilage of the pp. 15 of the chilage and the the ferms of the concelling the time of the decode of leader layed. It were to become off-cive day 1, 15, the vertice of the Att was appropriate decoded in the time of the object of the legal and valid by a decision of the upread four time legals v. climbing the continue case by a decide court, was filled an time one time one that case by a decide court, was filled an time one in the continued to operate, apparently the the considered parks continued to operate, apparently the the considered of overphory.

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"This suit, as already stated, was not filed until August 7, 1942. Defendants contend (and in the trial court pleaded as a defense) that the actions were barred by the

Statute of Limitations and by laches of the plaintiffs. These are, we hold, the controlling questions in this case. This suit was filed more than eight years after November, 1934, when the cause of action of plaintiffs and intervenors accrued.

"The Statute of Limitations (Ill. Rev. Stat. 1943, ch. 83, par. 16, sec. 15) provides:

"'All civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued.'

"Other sections of the statute provide that if a person is out of the state his action may be commenced within the time limited after his coming into or return to the State, and that if after the cause of action accrues he departs from and resides out of the State, the time of his absence is no part of the time limited for the commencement of the action. These provisions shall not apply to any case when, at the time the cause of action accrued or shall accrue, neither the party against nor in favor of whom the same accrued or shall accrue were or are residents of the State. Section 22 [III. Rev. Stat. ch. 83, par. 23; Jones III. Stats. Ann. 107.282] also provides the bar of the statute shall not apply in case of fraudulent concealment, but there is no pleading in this case nor evidence tending to sustain any of these exceptions. It would seem on the undisputed facts here the present action is barred by the statute, and we so hold.

"Defendants also contend plaintiffs and intervenors are barred from maintaining their suits by gross laches. We have already held the cause of action accrued in November 1934, and stated the complaint was filed August 7, 1942; the intervenors' complaint September 18, 1942. The order appealed from was entered November 8, 1944. In other words, the suit was begun more than eight years after the cause of action accrued and the decree appealed from was entered more than two years thereafter. We are therefore now considering a case where the alleged right of action accrued more than ten years ago. The law of laches is strictly applied to rights claimed under civil service statutes."

We have quoted extensively from the Fox case because we consider it controlling here. In the instant case the facts upon which plaintiffs predicate their right to relief are identical with those in the Fox case. The cause of action of plaintiffs and the intervenors in the instant case accrued at the same time as the cause of action in the Fox case accrued. This suit was not filed until October 1, 1942, more than eight years after the cause of action accrued. The judgment order appealed from was entered December 21, 1944,

statute of limitations and by Lohus of the alcintiffs, these are, we hold, the controlling questions in this case. This suit was filled near than eight poems after November, 19,4, then the coust of action of plaintiffs and intervenors accrued.

"The Stutute of Limit Sions (Ill. Nov. Sat. 1943, cb. 33, pur. 15, sec. 1) prevides:

"".ll sivil cations not observate provide, for shall be commanced within five years mixt after the cause of action corned."

The modes of we obtain a provise which a person is out of the strict instruction of y be considered with the first like of the configuration of the time limits of the first and that if ther in secretary the courtes and that if there was of rectar of the strict of the strict of the limit of the courte of the court of the court of the courte of the of the courte of

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more than ten years after the cause of action accrued. Defendants contend and pleaded in the trial court as a defense that the actions were barred by the statute of limitations and by laches of the plaintiffs. Inasmuch as the conclusions reached in the Fox case are in all respects applicable to the situation presented here, we are impelled to hold that plaintiffs and the intervenors are barred by laches in beginning and prosecuting this cause of action as well as by the statute of limitations.

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The judgment order of the Superior court of Cook county is reversed.

JUDGMENT ORDER REVERSED.

Friend, P. J., and Scanlan, J., concur.

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more than ten years after the cause of netion sample. Defendents contend and pleaded in the mill court as a defense that the actions were borres by the statute of limitations and by laches of the plaintiffs. Incomment as the conclusions reached in the low case, a in all respects applicable to the altuation preparty here are impolled to hold that plaintiffs and the interventer are barred by lacked the beginning and prosecuting this case of action as well as by the statute of limitations. The judgment order of the statute of feet court of court of courty is reversed.

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THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

V.

) ERROR TO MUNICIPAL ) COURT OF CHICAGO.

LAURA BAILEY,

Plaintiff in Error.

32 J.A. 584<sup>2</sup>

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, Laura Bailey, seeks to reverse the judgment order of the Municipal Court of Chicago which found her guilty "in manner and form as charged in the information herein," denied her application for probation, adjudged her guilty on the aforesaid finding of the criminal offense of "unlawfully and wickedly keeping and maintaining a house of ill fame, a place for the practice of prostitution and lewdness," and sentenced her to serve one year in the House of Correction and to pay a fine of one dollar. Defendant waived trial by jury and the cause was tried by the court on her plea of not guilty. Defendant's motions for a new trial and in arrest of judgment were overruled.

The information upon which the defendant was tried reads as follows:

"STATE OF ILLINOIS, )
COUNTY OF COOK, ) ss. In The Municipal Court of Chicago
CITY OF CHICAGO. )

VERA JEAN CURINGTON

a resident of the City of Chicago in the State aforesaid, in
his own proper person, comes now here into court, and in the
name and by the authority of the People of the State of
Illinois, gives the Court to be informed and understand that
Laura Bailey heretofore, to-wit: on the 14th day of OCTOBER,
A.D. 1945, at the City of Chicago aforesaid

Did then and there unlawfully and wickedly keep, and maintain a house of ill-fame, or place for the practice of prostitution or lewdness, to the encouragement of idleness, gaming, drinking, fornication or other misbehavior, or did let a house room, or other premises for such purpose to-wit at 325 E. 57th St. I floor Apt.

43614

LAURA BAILEY,

THE PROPILE OF THE STATE OF ILLINOIS,

Defendent in Error.

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Plaintiff in Error.

TA OR IS BUILDING AR COURT OF CHICAGO.

MH. JUSTICE SULLIVAN DELIVERED THE CRIMICE OF THE LOUR.

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The information apon thich the defaminant was tried reads as follows:

"STATE OF ILLINOIS; COUNTY OF COOK, In the Manieipal Court of Chicago CITY OF UNICAGO.

VERA JULN CUITKGTON
a resident of the City of Chicago in the State aforesaid, in
his own proper person, comes now here into court, and in the
name and by the authority of the recepte of the State of Illinois, gives the Sourt to be informed and understand that Laura Bailey heretofore, to-wit: on the 14th day of OCTOBER, A.D. 1945, at the City of Chicago aforesid

Did then and there uniowfully and michelly keep, and maintain a house of ill-dame, or place for the practice of prostitution or lewdness, to the encouragement of idleness, gaming, drinking, formication or other misbehavior, or did let a house room, or other premises for such purpose to-wit at 325 S. 77th St. 1 floor Apt.

In Violation of Par 162 of Chap. 38 Illinois Revised Statutes 1941

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

The verification of the information was in the following form:

"STATE OF ILLINOIS, )
COUNTY OF COOK, ) ss.
CITY OF CHICAGO.

being first duly sworn, on her oath, deposes and says that she resides at 631 E. 45th St, that she has read the foregoing information by her subscribed and that the same is true.

Vera Jean Curington

Subscribed and sworn to before me this \_\_\_\_\_day of Oct 17 1945 A.D.

JOSEPH L. GILL Clerk of the Municipal Court of Chicago."

Defendant contends that "the information being in the disjunctive form did not apprize the defendant of the specific and particular charge or crime that the defendant had to meet and defend against on the trial of said cause."

There is no merit in this contention. The information might have been more aptly drawn but it is not disjunctive in form. After properly charging the defendant with unlawfully keeping and maintaining a house of ill fame, the information went on to state "or did let a house, room, or other premises for such purpose to-wit at 325 E. 57th St. 1 floor Apt." The language following the word "or" could not possibly be construed as charging a separate offense. It was merely explanatory of the only offense charged - keeping a house of ill fame - and its sole purpose was to state the address of such house. In Blemer v. People, 76 Ill. 265, the Supreme court points out that where, as here, the word "or" is used in the sense of "to-wit", that is, in explanation of what precedes, it

in Violation of Par 152 of Chap. 8 Flitheis Levined Lt. tutos 1941

contrary to the form of the Lt into in small case and provided, and against the pacee in dignity of the Papple of the Liliable.

The verification of the information was a substruction ing form:

"DETITE OF COOKS, SS. JUST OF COOKS, SS.

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Chris of the Landridge of Chicago.

Defendant continue that the information being in the disjunctive form did not apprize the difficular form did not apprize the first name of the following the following the following the following the following apprinct on the trial of a to care."

There is no merit in this rententies. The information night have been more aprly drawn but it is not disjunctive in form. After properly drawiths the deformant with unlawfully lesping and distributing a house of ill fame, the information went on to state "of dislet a house, rosm, or other premises for such purpose to-wit at 3.17 k. //th Sv. I floor Apt." The language following the word "or" could not possibly be construed as charging a separate offense. It was deredy exclanatory of the only offense charged - heaving a house of ill fame and its sole purpose was to state the address of such house. In Marer v. Reople, 76 Ill. 267, the supreme court points out that where, as here, the word "or" is used in the sense of "to-wit", that is, in explanation of what precedes, it

does not make the information doubtful or duplicatous.

Defendant further contends that "the information does not purport to have been sworn to by affidavit or anyone else - the affiant's name having been omitted in the charging part thereof, and the information fails to allege that the particular house of prostitution was in Chicago."

There is not the slightest merit in this contention. The information specifically charged that defendant operated the particular house of ill fame in Chicago. It is idle to urge that the information was not properly verified. It was sworn to by the same person who signed it. In any event, even though the information was not sworn to or the verification thereof was otherwise defective, defendant by going to trial without objection that the information was not sworn to or verified in the proper manner, waived such objection. (People v. Billow, 377 Ill. 236.)

It is finally contended that "the denial of the application of the defendant for probation immediately upon making the request by the defendant, is tantamount to an arbitrary abuse of judicial power, and is reversible error."

In support of this contention defendant relies upon

People v. Donovan, 376 Ill. 602. In that case the defendant,
who was twenty years old, was indicted for forging a ten
dollar check. He was not represented by counsel. Upon his
arraignment he pleaded guilty and asked to be placed on probation. His request was denied and he was sentenced to the
penitentiary. Five days later counsel employed by his father
filed a motion to set aside the judgment and for leave to
withdraw the plea of guilty and to enter a plea of not guilty.
It was contended that the trial court erred "in sentencing
him to the penitentiary and refusing his application for
probation without causing an investigation to be made by the

does not make the information couldtul or daplications.

Bofeniant Justice contends that "the information ness not purpost to any a sean storm to by addition or anyone clso - the affirmate having been cateful in the charging part thereof, and the information of the the particular house of prositivation was in discuss."

These is not the alightest merit in this contention.
The information specifically in reset that it is mint operated the the particular leads of the particular leads of this law in the c. It is inker to urge that the information was not properly if variety. It was swearn to by the assurption also ign this, in any event the the the information was other as delication to this was other is edulation the return of the proper that the information vas not swear to or vertical without objects and to or vertical in the proper and or universuch objection, (reorie v. illes), IT II. I.

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probation officer and procuring his recommendation as the statute provides, and in sentencing him without hearing evidence on the question of aggravation and mitigation of the offense charged." It appeared that statements were made to the court by the state's attorney in aggravation of the offense but that the trial court heard no evidence in mitigation thereof and that probation was refused without referring defendant's application therefor to the probation officer for investigation and recommendation. There it was said by the court at pp. 606-607:

When paragraphs 732 and 786 [Criminal Code, chap. 38, III. Rev. Stat. 1939] are considered together, as required by all rules of statutory construction, it is manifest the legislature intended not only that an application for probation shall be investigated by the probation officer, but that the People and the defendant are entitled to have the court hear evidence in aggravation and mitigation of the offense, as bearing upon the question of whether the defendant shall be admitted to probation, as well as the conditions to be imposed, in case probation is granted. It would be an anomaly to hold that the court, in determining those questions, is confined either to the report of the probation officer, who might be unwittingly prejudiced against or in favor of the defendant, or representations made by the State's attorney. The duty of the court to make a full and complete investigation, and the rights or the parties therete clearly appear. The duties required of the probation officer demonstrate that his investigation is designed to assist the court in determining factors which would impinge upon the time of the court, but it is in no way conclusive upon the court, or the parties.

"The claim of defendant in error that paragraph 786 requires an investigation only when an application for probation is granted, and has no application to a request for probation which is denied, is so groundless as to need no discussion. The language 'and such other facts as may aid the court as well in determining the propriety of probation' clearly demonstrates that the legislature intended an investigation of the facts in every application for probation."

It might seem from the language used in the foregoing quotation from the <u>Donovan</u> case that the Supreme court held that an investigation by the probation officer is mandatory in every case where an application for probation is made.

However, the Donovan case has been distinguished in

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"The oldin of which he was trot with the property of two states and two old getten out when any wis tension and the blon for probation in granted, and has no ... plie then to a so west for probation which is ration, to we grownlass as to seem no checastion. The language into such other facts as may aid the court as well in her excinting the provincts of probation. It will be a court as well to be taken the provincts of the tended an investigation of the facts in every application for probation."

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However, the Donovan case her been distinuished in

two later cases - People v. Harrison, 392 Ill. 511 and People v. Brown, 392 Ill. 519. These cases were decided after the instant case was tried and after defendant's original brief was filed in this court.

In the Harrison case the defendant was tried upon his plea of guilty to three indictments charging him with robbery without a weapon, which three indictments were consolidated for hearing. Defendant's application for probation was denied and he was sentenced to the penitentiary. Relying on the Donovan case, it was urged as ground for reversal that the trial court erred in denying defendant's application for probation without having same investigated by a probation officer. It appeared that the trial court conducted a hearing on defendant's application for probation without referring such application to the probation officer for an investigation, that on such hearing the state's attorney presented all available evidence in aggravation of the offenses charged, that defendant presented all available evidence in mitigation of said offenses and that the defendant and his attorney had supplied as complete information concerning defendant's history and previous conduct as the probation department could have furnished if the application for probation had been referred to it for investigation. the Harrison case, in distinguishing the Donovan case, the court said at pp. 517-518:

"Defendant relies upon People v. Donovan, 376 Ill. 602, as being decisive in his favor. There, the defendant was convicted of forgery upon his plea of guilty, the punishment for this crime being an indeterminate sentence. Donovan was not represented by counsel. Thereafter, a motion was made to vacate the judgment and for permission to withdraw the plea of guilty. Affidavits were filed by the State's Attorney of Lee county in support of his answer resisting the motion. Evidence was adduced in aggravation but not in mitigation of the offense. Considering the statutory provisions (pars. 732

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In the Jarrison case the defendant out tried upon his plea of gality to three invictments sharping his oil. robbery without a wagen, which three in Michaels ere consolidated for heartns. Tefani atts as its tion for probation was denied and he was sentenced to the peritemtiary. Relying on the Jogovan asse, is see ungaine promi allimbrate beginning in borro truce laint out take Lucrovor roll application for probation dithout as ing the law stiggted y a probation officer, it appears that the trial court comducted a hearing on defendant's application for probation without referring such application to the probation officer a' obstraction, that un such hearth the the total attorney presented all available evidence in aggravation of the offenses charged, that automiant presented all available -cnels! said taid the agametho bles to notingliful at complive and and his attorney had supplied so so lede in or action concerning defendantly another the provider conduct as the acid will go wit hi bedwinen' we a blace themtraged notified ag for probation had been referred to it for investigation. the Harrison case, in distinguishing the Denovan case, the court said at pp. 117-118:

<sup>&</sup>quot;Defendant relies upon People v. Conoran, 76 ill, 50%, as being decisive in his favor. There, the defendant was convicted of forgery upon his plea of guilty, the punishment for this crime being an indeterminate sentence. Conovan was not represented by counsel. Thereafter, a motion was made to vacate the judgment and for permission to ithdraw the plea of guilty. Affidavits were filed by the State's Attorney of Lee county in support of his answer resisting the motion. Evidence was adduced in aggravation but not in mitigation of the offense. Considering the statutory provisions (pars. 732)

and 786) together, we observed: 'The discretion the court may exercise upon an application for probation is not an arbitrary discretion to be exercised at the mere will or whim of the court, but is a sound legal discretion dependent for its exercise upon the facts shown. It is obvious that where the facts are not shown and are not inquired into, the denial of probation is an arbitrary and unauthorized exercise of the power.' Here, the facts were adequately disclosed. A full inquiry was made and the trial judge had an exceptionally complete history of the defendant's life before him when he imposed sentence.

"After evidence in aggravation and mitigation was heard, defendant's attorney said he would like an application for probation entered, not that he thought he would get probation but so the court could have a complete history. The court asked if he was asking for probation and the attorney replied: 'Just so your honor will get a complete history of this boy.'
The court recounted everything proved in the case and
commented that everything was shown that a probation officer
could find except whether he attended church. Defendant then
testified that he did at times attend church. The court then Defendant then The court then This is all the information the probation department would get so we know as much about it today as we ever will. Is that right? Probation was then denied and the sentence was for a minimum of five and a maximum of ten years. The attorney said that was too much, but made no exceptions or protest against denying probation. It seems clear that all the facts that could be shown were shown, and the attorney regarded it as a hearing for probation and took no exception to the manner of hearing by the court instead of by the probation officer. No claim is made that any additional facts could be adduced which would result in a different action by the court. We think the record is sufficient to show either a waiver of referring the matter to the probation department or an agreement to have the evidence submitted to the court considered as a hearing for probation. In either event the case of <u>People v. Donovan</u>, 376 Ill. 602, would be inapplicable, because the element of arbitrary action is wanting and because the defendant has had the benefit of a hearing."

But defendant states in her reply brief that "the case of the defendant in the instant case and the case of The People v. Harrison cited by defendant in error is not only not in point but wholly inapplicable and should have no bearing upon this court" and that "it could readily be seen that if the court in any case before it should possess an arbitrary discretion to refuse an application for probation in a case upon a plea of not guilty, when the facts concerning a defendant's past life and history do not necessarily have to come before the court, as they could upon a plea of guilty, where under

and 780) together, we observed: "The incestion the court may energic upon an appliantian for a condition is not an appliantiant for a condition to be exercise; at the area will entain of a societ, but is a sound ingel incertion distant for its exemples upon the facts shown. To it a problem that an area and inside the denial of problites in a solitor and and anial of problites in a solitor and a stronglad and colored. I fall incurry via another the trial incurry via another the trial incurry via another the trial incurry via another colored. I fall incurry via another the trial increase of the colored in about in imposer contine.

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Dut descendent of the instant of an interest of the case of the defendant in the instant of the defendant in the case of the property of the property of the property of the property of the point of the wholly inapplicable and should have no bearing upon this court and that "it could readily be seen that if the court in any case before it should possess an arbitrary the cretion to refuse an applie then for probation in a case upon a plea of not guilty, when the facts concerning a defendant's past life and history do not necessarily have to open before the court, as they could upon a plea of guilty, where under

mitigation of the offense, such an assumed discretion was never contemplated by the legislature in enacting the probation statute, and such a line of procedure would practically mullify the benefits that accrue to a defendant under the Act." As to her position in this regard defendant neglected, inadvertently or otherwise, to discuss or even refer to the case of People v. Brown, supra, where the defendant was tried by the court without a jury on his plea of not guilty to an indictment charging manslaughter. In that case defendant's application for probation was not referred to the probation department for investigation. There, after reviewing the evidence and holding that it warranted the trial court in finding that the defendant was guilty beyond a reasonable doubt, the Supreme court said at pp. 522-523:

"Defendant's counsel asked the court if he would consider probation. The court replied that he would not, that he would accept the motion, but would refuse it. On this proposition the court said: 'Except for this particular act, of course, his reputation and his conduct have been apparently all right. But from this evidence the court is not justified in giving probation. I could have an examination made, but it wouldn't disclose any more than we probably know here. He is lucky he is not charged with murder.' It is perfectly apparent the court was willing to consider that the defendant was one who would be eligible for probation, except for the extremely serious nature of the crime and the facts surrounding it. We have several times held that we cannot review the discretion of the trial court in granting or refusing probation. People v. Denning, 372 III. 549; People v. Racine, 362 III. 502; People v. Wheeler, 349 III. 230.

"Plaintiff in error calls our attention to People v. Donovan. 376 Ill. 602. The facts in that case are not parallel. In that case a young man twenty years of age was indicted for forging a small check; he pleaded guilty, and, in refusing his application for probation, the court heard evidence in aggravation of the offense, and refused to hear evidence in mitigation. The defendant had pleaded guilty without counsel. In that case we held that the discretion given the court was not arbitrary discretion. In this case the court did receive the application for probation, and did consider that the defendant's reputation and previous conduct were good. He did determine, however, that the facts surrounding the commission of the crime were so serious that he would not be justified in granting probation. When facts which could have been shown by hearing are considered as proved by the court, there could be no abuse of discretion in denying probation in this case."

the statute the court must hear evidence in agravation and mitigation of the offense, such an assumed isomethouses never contemplated by the logislature in smoothng the promoter statute, and such a line of prosecurs would exactionly, antilify the benefits that accrue to a deformant under the section. As to her position in this reprishent anglested, and—vertently or otherwise, to discuss or even write to the case of People v. Flown, sugar, there the deformant was tried by the court without a just on like place of not whilly to an indiction charging maslengister. In that a case application for probation has not refer to a secundant's application for flow being the fit werented to the probation department for the objection. There after could the probation of that the department for the said at the contact the test of acceptant and the the department court said at m., pointly beyond a court in the department court said at m., pointly beyond a court of the top court and of the probatic court.

"Designdant's occurred with the sould is sould constant probation. The court replied that he would not seem the motion, but roud is sure if. In this proposition the court said: 'Kneept the tide perchadase set, of course, interpretation and his convert is very local expectably all right. The free this evidence the convert in the surface of the second of the repretation of the repretation of the said of the said of the second of the second of the said of the s

"Pleintiff in erro calls our attention to people v. Denovan, 376 Ill. 602, The facts in list ease are not parallel. In that case a young ran twenty rear of age was indicted for loring a small check; he pleaded pailty, and, in refailing its application for probation, the court heard evidence in adjustion. Its application of the offense, and rounsed to hear evidence in midgation. The defendant had pleaded guilty without counsel. In that case we held that the discretion given the court was not arbitrary discretion. In this case the court did receive the application for probation, and did consider that the defendant's reputation for probation, conduct were good. He did determine, however, that the facts surrounding the commission of the crime were so serious that he could have been shown by hearing probation. Then facts which court, there could be no abuse of discretion in denying probation in this case."

It seems clear from the Harrison case that if a defendant is tried on a plea of guilty to an indictment or information charging him with the commission of a criminal offense and he makes an application for probation, the trial court may properly dispense with an investigation by the probation department if a hearing is had on such application upon which the state's attorney and the defendant are respectively permitted to present evidence in aggravation and mitigation of the offense and the trial judge is just as fully apprised on such hearing of defendant's previous life and conduct as he would have been if a probation officer had investigated same and made a report thereon. It seems just as clear from the Brown case that, where a defendant is tried on a plea of not guilty to an indictment or information charging a criminal offense and is found guilty and then makes an application for probation, the court may properly dispense with an investigation by the probation department if the trial judge received such application and denied probation because of the enormity of the crime or because the facts in the case were so serious that he would not be justified in granting probation, notwithstanding he considered that the defendant's reputation and previous conduct were good.

what is the situation here? As heretofore shown, defendant was tried by the court on her plea of not guilty. After she was found guilty an application for probation was made in her behalf. She asserts that same was denied "instanter" or "immediately". The record does not so show. The order entered was "application for probation denied." It is significant that defendant did not include a bill of exceptions in the record filed in this court. It is true that no investigation by the probation department was ordered in connection with defendant's application for probation. It also may well be true that a

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What is the situation here? As introcedere shown, defendant was tried by the court on her pies of not sailey. After she tas found guilty an application for probation was made in her behalf, who asserts that same was demied "instanter" or "insudiately". The record does not so show, the order entered was "application for probation demied." It is significent that defendent did not include a bill of exceptions in the record filed in this court. It is true that no investigation by the probation department was ordered in connection with defendant's application for probation. It also may well be true that a full hearing was held by the trial court on her application for probation which rendered an investigation by the probation department unnecessary or that the trial court heard evidence as to her reputation and previous conduct and refused to grant her probation because of the serious nature of the crime committed by her. In the absence of a bill of exceptions it will be presumed that the trial court acted properly in the disposition of defendant's application for probation.

The judgment of the Municipal court of Chicago is affirmed.

JUDGHENT AFT TRUED.

Friend, P. J., and Scanlan, J., concur.

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EDWIN JOHNSON,
Appella

Appellant,

v.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

CHESTER HARMAN, Appellee.

32

L.A. 585

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff, Edwin Johnson, seeks to reverse the final order of the trial court which sustained the motion of defendant, Chester Harman, to strike plaintiff's statement of claim and entered judgment in favor of defendant for costs.

Plaintiff's statement of claim is as follows:

"That in or about the month of August 1941, at Chicago in said Cook County, the defendant, Chester Harman (who was then a member of the Tenth Ward Republican Organization in Chicago) represented to the plaintiff that he could obtain the appointment of the plaintiff as a State Highway Maintenance Police Officer for the State of Illinois.

"That at or about the aforesaid time the defendant also falsely and fraudulently informed the plaintiff and falsely and fraudulently represented to the plaintiff that in order to obtain the appointment of the plaintiff as such State Highway Maintenance Police Officer the defendant would be obliged to pay to one John T. Dempsey (who was then Chairman of the Cook County Central Committee of the Republican party) and one Walker Butler [State Senator] the sum of Five Hundred and Fifty Dollars (\$550.00).

"That the plaintiff, desiring to obtain such appointment as State Highway Maintenance Police Officer for the State of Illinois, and relying upon the aforesaid false and fraudulent representation of the defendant that to secure such appointment for the plaintiff it was necessary that the defendant pay to said John T. Dempsey and said Walker Butler the sum of Five Hundred Fifty Dellars (\$550.00) the plaintiff did pay to the defendant at three different times in the months of August and September in the year 1941, said sum of Five Hundred Dellars (\$550.00) in three installments, one of Three Hundred Dellars (\$300.00), one of One Hundred Seventy-five Dellars (\$175.00), and one of Seventy-five Dellars (\$75.00), all in cash or currency of the United States of America.

"That said statements of the defendant to the plaintiff were wholly false and untrue and this defendant is informed and believes and therefore states the fact to be that said

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HOWIN JOHNSON, appellant,

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APPEAL PROM MUNICIPAL .OD. DING UNIO LATTOO

> OHRSTER HARMAN, Appellee.

MR. JUSTICA SUBLIVAN DALLVARRD IND OFFICH OF THE COURT.

by this appeal plaintiff, Edwin Johnson, seeks to reverse the final order of the trial court shich sustained the motion of defendant, Chester Harmen, to strike plainfor tovel al Jesuphy borders and entered judgment in favor of defendant for costs.

Plaintiff's statement of claim is as follows:

"That in or about the rowth of ugust 1941, at thioses in said Cook Councy, the derivations, Sheater Rerach (who was then a dember of the Renth such I is discussive them in Chicego) represented to the plain. It is not he could obtain the appelant of the plain of the appelant of the plain of the appelant of the Plain State Hillings of These of Hillings.

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"That said statements of the defendant to the plaintiff were wholly false and untrue and this defendant is informed said believes and therefore states the fact to be that said defendant was not required to pay, and did not pay, said sum of Five Hundred and Fifty Dollars (\$550.00) to said John T. Dempsey and said Walker Butler to obtain the appointment of the plaintiff as State Highway Maintenance Police Officer for the State of Illinois.

"That the plaintiff implicitly relied upon said statements and representations made to him by said defendant.

"That the defendant wilfully and maliciously made said statements and representations, knowing them to be false, and untrue, with the purpose that the plaintiff should act thereon to his loss and damage.

"Wherefore, the plaintiff demands judgment against the defendant for the sum of Five Hundred Fifty Dollars (\$550.00) with interest thereon from October 1, 1941 to the date of the entry of such judgment."

Defendant's motion averred that the statement of claim should be stricken because (1) it "states no reasonable cause of action and is incapable of being so amended as to state a reasonable cause of action" and (2) it "is defective and insufficient \* \* \* in that the subject matter of the claim and the contract pleaded is in violation of the public policy of the State of Illinois and therefore illegal and void."

Plaintiff's theory as stated in his brief is that "because the defendant obtained the money from the plaintiff through fraud and false representations and because the defendant never paid or used this money for the purpose for which he obtained the same from the plaintiff, and because the defendant retained the same for his own use, the guilt or turpitude of the defendant much exceeds that of the plaintiff; and that the plaintiff and the defendant are not in pari delicto, or equally guilty in this transaction. That under the great weight of authority (including that of the courts of Illinois) the more innocent of two parties, especially the one who has been defrauded by the other, such as the plaintiff in this case, may recover from the defrauder. And also that the defendant never consummated the alleged illegal transaction, the alleged illegality of which he is

defendant was not required to pay, and did not pay, said sur of Five lundred and fifty Collars (J5)0.00) to said John T. Dempsey and said Talker Autlor to obtain the appointment of the plaintiff as tate hi hway maintenance Police Officer for the State of Illinois.

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Defendent's routen or and that the statement of claim should be stricten to a see [I folionate no reasonable cause of aution and is inspective of the source source of aution and (I) it is defective and insulation of aution the subject with a of the claim and the contract placed is in violation of the public policy of the Illinois and therefore illegal and void."

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And also that the defendant never consummated the alloged tilegality of which he is

now attempting to use as a defense; and also that a much stronger public policy requires that the defendant should not be permitted to retain this money obtained by him through fraud and false representations, and that this stronger public policy requires that the courts should aid the plaintiff in recovering this money which the defendant is attempting to keep after having obtained it by fraud and false representations."

Defendant's theory is that "plaintiff by his pleadings confessed that he knowingly and wilfully joined with
the defendant to procure and did procure by bribe or purchase
appointment as a State Highway Maintenance Police Officer of
the State of Illinois and illegally paid money to that end.
The illegality of the transaction appearing of record upon
being brought to the attention of the court required the
court to declare the same unenforceable and void."

The sole question presented for our determination is whether plaintiff's statement of claim stated a cause of action and for the purpose of this appeal all the well pleaded allegations of fact in the statement of claim must be assumed to be true.

The gist of plaintiff's claim as set forth in his statement of claim is that the defendant induced him to pay said defendant the money sought to be recovered herein on the false representation that the defendant would pay it to the aforementioned John T. Dempsey and Senator Walker Butler for an illegal purpose and that the defendant is now trying to avoid paying the money back to plaintiff on the ground that he (defendant) obtained the money for an illegal purpose.

Plaintiff contends that "by the great weight of authority the less guilty of two parties to an illegal

now attempting to use as a defense; and also that a much stronger public policy requires that the defendant should not be permitted to retain this money obtained by identifurough fraud and false representations, and that the start that the courts should eight the plaintiff in recovering this maney which the defendant is attempting to keep after having obtained it by froud end false representations."

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Plaintiff contends that "by the great weight of authority the less guilty of two parties to an illegal

transaction may recover from the one guilty of greater turpitude the money he paid to the more guilty one, especially
if the latter has not paid out such money and has not consummated the illegal transaction" and that "the doctrine that
if the parties to an illegal transaction are not in paridelicte and that the less guilty may recover is especially
applicable where, although the parties concur in the illegal
act, fraud is practiced by one party upon the ether so that
it appears that the guilt of the latter is subordinate to
that of the former."

The general rule is that when two or more persons engage in an unlawful enterprise, or agree to do an illegal act, or one prohibited by public policy, and spend or pay out money to each other or otherwise in aid of some unlawful enterprise, the law will aid neither, and leave them where they place themselves. However, there are exceptions to the general rule permitting one who has been a party to an illegal transaction to recover money paid to another party to such transaction.

In 13 Corpus Juris, sec. 442, it is said at p. 498:

"Where the parties to a contract against public policy or otherwise illegal are not in pari delicto, or equally guilty, which they may not be, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him. [Citing among other authorities Woodall v. Peden, 274 Ill. 301.] The cases of this character are generally where the party asking to be relieved from the effect of an illegal agreement was induced to enter into the same by means of fraud. Here he is not regarded as being in pari delicto with the other party, and the court may relieve him."

(17 C. J. S., sec. 274 is to the same effect.)

In 12 Am. Juris., sec. 216, the following rule is stated at p. 732:

"As stated above, relief is sometimes given to parties in pari delicto in cases in which the giving of such relief has the effect of discouraging the making of illegal agreements. For a similar reason the courts

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allow a party who, though he is in pari delicto, repudiates the agreement while it is executory to recover whatever he has given thereunder, the recovery being, not under the agreement, but in disaffirmance of it, on a promise implied or a right existing independently thereof."

In Woodall v. Peden, 274 Ill. 301, the court said at p. 306:

equity may give relief to the one that is comparatively innocent. The court does not so much concern itself with the fortunes of the parties, or either of them, as it does with public policy that such contracts shall not be made and that no one shall take any advantage from the making of them, provided the conduct of either has been such as to receive consideration. The court will allow the remedy, not for the sake of the party who makes the objection but on the grounds of public policy. (Pomeroy's Eq. Jur. Sec. 402-429.)"

In Evans v. Funk, 151 Ill. 650, it was said at p. 657:

"It is true, as a general rule, that when two or more persons engage in an unlawful enterprise, or agree to do an illegal act, or one prohibited by public policy, and spend or pay out money to each other or otherwise in aid of some unlawful enterprise, the law will aid neither, and leave them where they place themselves. But this general rule has its exceptions, arising out of necessity or from unyielding principles of public policy or from the different conditions of the parties. The different degrees of turpitude, immorality or illegality may be so great between different persons engaged in such acts that the general rule will bend to meet the demands of such case and allow a recovery. In story's Equity Jurisprudence, section 300, it is said that 'in cases where both parties are in delicto, concurring in illegal acts, it does not follow that they are in pari delicto, for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship or undue influence, or great inequality in conditions of age, so that his guilt may be far less in degree than that of his associate in the offense. And, besides, there may be, on the part of the court itself, a necessity of supporting the public interest or public policy in many cases, however reprehensible the acts of the parties may be.'"

"To the same effect are Bachr v. Wolf. 59 Ill. 470; National Bank & Loan Co. v. Petrie, 189 U. S. 423; White v. Franklin Bank, 22 Pick. 181; Tracy v. Talmadge, 14 N. Y. 162; Quirk v. Thomas, 6 Mich. 111.)

It clearly appears from the foregoing authorities that the least guilty of two parties to an illegal transaction, especially where he has been fraudulently induced to become a party to such transaction, may recover what he has paid to cllow a perty who, though he is in part colleto, repudiates the agreement while it is excentery to recover the bas given thereumer, the recovery being, not unior the agreement, but in listfif active of it, on a promise implied or a right existing independent.

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persons entage in an united in the relation of the relations of the sone illegal act, or one prohibited in public collegy, and spend on pay out money to open other or otherwise in the of some uniterial entagrates, but law will aid neither, and leave them uniterial entagrates, but this aid neither, and leave them uniterial entagrates. But this aid neither, and leave them where they place them will gut of necessity or from unyleiding exceptions, arising out of necessity or from unyleididing of the parties. The airformating out different or anyleiding of the parties. The airformating of the parties are the consent of unyleids, immorelity in the acts the the consents of such that the consent in the to nest the formation of such that all of the other the footh parties are in delicated, consent in the interest of the case where the gray of the case that the relation party may cet unit electrost of operation imposition, and often are, very fifterent degrees in the same intended of the court iterity as the unity in outitions of age, so that his guilt day be not less in degree than that the part of the court iteriff, an essaint of ungerting on the public interest or paints and be, in a position the public interest or paints and be, in a public thereast or the parties are position of the court iteriff, an essaint or ungerting the public interest or paints of the court iteriff an essaint or ungerting the public interest or the parties may be, in

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It clearly appears from the foregoing authorities that the least guilty of two parties to am illegal tronsaction, especially where he has been fraudulently induced to become a party to such transaction, may recover what he has paid to the other party to the unlawful enterprise. According to the statement of claim defendant fraudulently induced plaintiff to become a party to the illegal transaction and to pay him \$550 on his representation that it was necessary for him to turn over that amount to the two aforesaid public officials to secure plaintiff a position as a state police officer and plaintiff relied on defendant's false representations but the latter did not consummate the illegal transaction and appropriated the \$550 to his own use.

The statement of claim portrays defendant as a veritable confidence man and surely the law as a matter of necessity in supporting the public interest or public policy will compel a confidence man to return to his victim money obtained from him, even though such victim indicated a willingness that the money paid by him to the confidence man might be used for an illegal purpose. In our opinion the statement of claim alleged every essential element necessary to constitute a good cause of action but we do not agree with plaintiff that the statement of claim presented any question of a confidential relationship or agency.

Defendant relies solely on the general rule applicable to persons who engage in an unlawful enterprise and who are in pari delicto. He makes no attempt in his brief to answer plaintiff's contentions regarding the exceptions to the general rule or the authorities cited in support thereof.

Defendant cites five Illinois cases in support of the general rule but since said rule does not cover a factual situation such as that presented by the statement of claim, it would serve no useful purpose to discuss or distinguish them.

We are impelled to hold that the trial court erred in

the other party to the unlawful interprise. It ording to the statement of claim different distribution and the staff to heeme a party to the fallogal translation and to pay lim y5/0 on his representation that it was necessary for him to turn ever that amount to the two cherical public officials to seare plaintful position as a tata police officer and plaintful rolation on different and plaintful rolation on differentials I have representabless and plaintful rolation on differentials that the liter of the search the search the search and appropriately the search on and appropriately the search on and appropriately the search on and appropriated.

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sustaining defendant's motion to strike plaintiff's statement of claim and in entering judgment in favor of defendant.

of the Municipal court of Chicago, including its order sustaining defendant's motion to strike plaintiff's statement of claim, is reversed and the cause is remanded with directions that defendant be required to file his answer or defense to the statement of claim and that such further proceedings be had as are not inconsistent with this opinion.

JUDGMENT ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

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For the reasons stated berein the judgment order of the Municipal court of chicago, including its order sustaining describint's notion to strike plaintiff's otatement of claim, is reversed and that couse is remanded with directions that car may be required to file his answer or defense to the statement of claim and that such further proceedings be had as are not inconsistent with this opinion.

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Friend, F. J., and Joanian, J., concur.

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CHARLES MARRON, JR., a minor by his father and next friend, CHARLES MARRON, SR.,

Appellee,

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THOMAS J. FRIEL and CHARLES C. RENSHAW, as Trustees, etc., et al., doing business as Chicago Surface Lines, and J. J. McAleenan,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

3207.A. 586

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action involving a street car and two automobiles. Plaintiff had verdict and judgment for \$5,000 and defendants appeal.

January 3, 1944, about 4:45 P.M., Peter Cosey, in his Oldsmobile automobile facing east on 63rd Street between Greenwood and Ellis avenues, Chicago, Illinois, sought to make a "U" turn in order to proceed west. A westbound street car operated by McAlleenan collided with the Oldsmobile. Following the collision the Oldsmobile veered southwest and struck another automobile parked at the south curb of 63rd Street. The parked automobile was thrown over the curb and across the sidewalk, pinning plaintiff's minor 8 year old boy against the base of a plate glass window into which the boy was gazing. He was severely injured.

The issues presented to the jury were whether defendants were guilty of failure to keep a proper lookout, careless operation and excessive speed.

Defendants contend there was no proof that they were guilty of negligence which was the proximate cause of plaintiff's injuries. In any event, they say, the verdict is contrary to the manifest weight of the evidence.

CHARLES MARRON, JR., n minor by his father and next friend, dharles Marron, Dr.,

Appellee.

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THOMAS J. FAILL and Cr. 1.3 C. RENSHAP, as Trustees, etc., et al., doing business es Chicago Burfsoe Lines, and J. J. McAleenan,

Abbellents.

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January 3, 1844, about 4:45 F.F., Feter Sorey, in his oldsmobile automobile freing er.t on d3rd trast between Freenvood and Ellis evenues, Shicago, Illimais, sought to pake enth turn in order to proceed west. A westbound street our toer fed by McAlleenan collined with the Oldsmobile. Tollowing the collision the Oldsmobile vecred continuest and struck another rutomobile parked at the south curb of TSri Street. The cerief automobile was thrown over the curb and across the size of a straing of intiff's minor 8 year old boy against the decres everely injured.

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Defendants contend there was no proof that they were guilty of negligence which was the proximate cause of plaintiff's injuries. In any event, they say, the verdict la contrary to the manifest weight of the evidence.

Plaintiff did not sue Cosey. The question of Cosey's negligence is not involved.

We shall consider first the question of law whether the case should have gone to the jury. The testimony most favorable to plaintiff is that before commencing the "U" turn, Cosey and his wife looked both ways on 63rd Street and saw no traffic either way for a couple of blocks; that the pavement was dry and the day fairly light; that at the time of the collision the Oldsmobile had completed the turn, was facing and proceeding west from 5 to 7 miles an hour, in second speed; that the Oldsmobile was struck by a street car, moving west about 20 miles an hour, which did not slacken speed before the impact; that McAleenan did not see the peril as soon as his passengers because his attention was diverted to the "right"; and that the Oldsmobile, out of Cosey's control, swerved southwest to complete the course described in our statement of facts. We believe that evidence tends to prove negligence on the part of the defendants.

The question of proximate cause must be answered by the determination of what the motorman, as a prudent man, should have foreseen as the probable consequences of his conduct. In our determination we again take the evidence and inferences favorable to plaintiff at the close of the evidence.

Sixty-third street is a 45 or 50 foot business street carrying two street car tracks. The south curb is 25 feet from the westbound tracks. The Rapid Transit Elevated structure is overhead. At the time of the accident, both sides of the street were parked solidly with automobiles. Most of the stores were open for business. McAleenan had been on the route for several months. Should he have foreseen that, driving a street car at 20 miles an hour, under the conditions noted, his attention

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diverted to the right and without slackening speed, he would collide with the Oldsmobile proceeding west at a slow speed ahead of his street car, so as to cause Cosey to lose control over it and the Oldsmobile to swerve southwest 25 feet at increasing speed to the south curb, there to collide with a parked automobile and force it over the curb and across the sidewalk? We think reasonable men would disagree in their answer to this question.

We, accordingly, believe the question was for the jury.

We turn now to the question whether the jury's finding that defendants were guilty of actionable negligence was against the manifest weight of the evidence.

Cosey testified the Oldsmobile was in good mechanical condition; that he had been facing west, going from 5 to 7 miles an hour for a few seconds and had proceeded due west about 12 or 15 feet before being struck; that he looked both ways before commencing the "U" turn and for three or four blocks saw nothing; that he made the "U" turn in second speed and, when struck, the left wheel of his automobile was between the east and westbound tracks and was headed directly west; that he lost control of the car and, having been thrown forward, his head was injured and his hands were knocked off the steering wheel; that he did not put his foot on the accelerator, but did not have presence of mind sufficient to apply the brakes and the speed of the Oldsmobile increased: that he tried to keep from running his automobile up on the sidewalk and did not have time to stop the forward motion; and that by the time he got both hands on the steering wheel, the car had stopped against the building before he realized what had happened.

Cosey's wife, sitting in the rear of the automobile, said she saw no street cars for three blocks either way; that the Oldsmobile, when struck, had been facing and proceeding due west

diverted to the right and without elackening ecced, at would collide with the Oldsmobils proceeding measures also eccess sheed of his street own, so as to cause forcy to lose control over it and the Oldsmobile to swerve couth eat to feet at investing apeed to the south curb, there to collide with a streed automobile and force it over the curb and seroes the sidewilk of think reasonable men would discree in their enemor to this cuertion. We, accordingly, believe the cuestion was for the july.

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Cosey's wife, sitting in the rear of the automobile, said she saw no street dars for three blocks either way; that the Oldsmobile, when struck, had been facing and proceeding due west

for a few seconds; and that the impact was "terrible" and she felt a "terrible jolt" which "dazed" her and threw her against the front seat.

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Nelson testified that he was walking west on the south side of 63rd street; that when he first saw the Oldsmobile it was facing west on the north side of the westbound tracks, moving about 9 miles an hour: that the street car was at the time about 40 feet away, going about 15 miles per hour; that the street car did not change its speed before the collision; that the street car moved 5 to 8 feet after the collision; that the Oldsmobile picked up speed and was going, maybe 15 miles an hour, when it struck the second car: and that he saw no eastbound street car during the incident. Referred to a statement signed by him for the Street Car Company's representative, he said he had never read it and that he did not tell that representative that the street car was going 12 miles an hour; that he said nothing about seeing an eastbound street car, but remembered saying that it pulled in front of the car so suddenly the motorman did not have a chance to stop; and did not say previously that the street car moved only one or two feet after impact.

Two police officers testified to the condition of the car, one said a dent just above the tail light on the right rear of the Oldsmobile was the only damage. He said it was dark at the time of his inspection and that he did not recall that the tail light was broken. The other officer testified that the right rear side of the back of the Oldsmobile was smashed, completely pushed in and the tail light broken.

McAleenan testified he had been working for the Surface Lines about 10 months, and 6 months on 63rd Street, when the accident for a few seconds; and that the impact was "terrible and she folt a "terrible jolt" which "dared" her and threw her against the front seat.

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McAleenan testified he had been working for the Surface Lines about 10 months, and 6 months on 55rd Street, when the accident

occurred. He left its employ in March, 1944. He was familiar with the scene of the accident. Proceeding west he had stopped at Greenwood Avenue, a short block east of Ellis Avenue and had gone a half block west when the accident occurred. He testified his car was going 12 or 15 miles an hour and an eastbound street car which obstructed his vision to the west passed him; that the Oldsmobile, making a "U" turn, came into his vision when 15 feet away; that he reduced his speed to 5 miles an hour before the collision; that the Oldsmobile was going "pretty slow", slower than the street car and was struck a solid blow; that its speed was increased after the impact; and that he had used everything possible to stop the street car and after the impact stopped in about 4 feet. He further testified that he was going 15 miles an hour and that it might take 30 feet to stop the street car at that speed.

Witness Wilson was riding on the front platform of the street car. He said the Oldsmobile made a "U" turn from behind the eastbound car and when he saw it it was about 15 feet in front of the street car going west; that the back wheels of the Oldsmobile were in the westbound tracks when the accident occurred and at the impact its speed was increased; that the motorman did everything he could to stop but there was no way "in the world" to avoid the accident, and that the impact bent the body of the Oldsmobile out of shape and "caved" it in; that he heard another passenger say "Stop it!"; and it was after that the motorman applied the brakes,

Witness Tolmie said the Oldsmobile made a "U" turn directly behind the eastbound street car into the path of the west-bound street car; that its front wheels had entered the westbound track when the street car was 15 feet away and, by the time the motorman got control, it was 12 feet away; that the Oldsmobile was

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smashed in very little at the rear; that he saw the Oldsmobile before the motorman and told the motorman to stop the car and the latter immediately applied the brakes; that when he called the motorman had his head turned slightly toward the right, watching an automobile which was coming from a garage on the north side of the street; that it was not until he shouted that the motorman applied the brakes; that the street car went about 10 feet after the collision; and that the impact caused the driver to lose control and gave the Oldsmobile more momentum. The witness admitted that a couple of weeks after the accident he stated that the front of the street car was 30 feet from the Oldsmobile when he first saw it and at that time the motorman was looking toward the right.

Witness Daniel testified that as the westbound street car was passing an eastbound car, the Oldsmobile made a "U" turn; that when he first saw it it was 15 or 18 feet away with its front wheels on the westbound track; that he did not hear anyone shout to the motorman, but he heard him make an exclamation and try to stop; that the street car was going between 15 and 20 miles an hour and "caught" the automobile; and that "perhaps" the impact caused its speed to increase.

The statement signed by Nelson was introduced in evidence.

According to it Nelson stated that the street car was moving about

12 miles an hour and, after the impact, moved only one or two feet

and that the Oldsmobile was behind an eastbound street car and pulled
in front of the westbound car.

The questions of the credibility of the witnesses Nelson and Tolmie, whom counsel sought to impeach, were for the jury.

Whether the accident was attributable to Cosey's sudden turn from behind an eastbound street car, or to the motorman's failure to keep a proper lookout or observe reasonable speed under

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Whether the zecident was attributable to Cosey's sudden irn from behind an eastbound street car, or to the motorman's filure to keep a proper lookout or observe reasonable speed under

the circumstances or act properly after he had notice, or both, was a question for the jury. If the motorman was negligent in any degree, it is enough to sustain the verdict if the negligence was the proximate cause of plaintiff's injuries. The jury resolved the questions in favor of the plaintiff.

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The Coseys testified that before commencing the turn they looked both ways and could see two or three blocks and saw no street car either way. Defendants say that no reasonable mind can accept this testimony as true. The jury may have disregarded this extreme testimony. It was not required to completely disregard all of the Coseys' testimony on that account.

There is no contention that Gosey had no right to make a "U" turn, or that he could not cross defendants' tracks for that purpose. The right of the Surface Lines in its tracks is not absolutely paramount.

speed of 20 miles an hour for a street car is not negligence per se. It is plaintiff's point that 20 miles an hour while looking away, when he should have been applying brakes, is negligence. The jury may have believed the motorman should have seen the Oldsmobile before he did and that, had he done so, he could, with ordinary care have avoided the accident. It is no defense to say that he did everything he could to avoid the accident after he observed the peril, when the charge is that he should have observed the peril sooner.

We think it was for the jury to say whether the motorman used ordinary care in diverting his attention to the possible danger on the right, while going 20 miles per hour on 63rd Street between Greenwood and Ellis Avenues under the circumstances.

Defendant says the motorman did not divert his full attention. There can be little doubt from the evidence that the motorman did not

the circumstances or act properly after he had notice, or both, was a question for the jury. If the motoraan was nepliment in any degree, it is enough to sustein the verdict if the negligence was the proximate cause of plaintiff's injuries. The jury resolved the questions in favor of the plaintiff.

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We think it was for the jury to say whether the motorman used ordinary care in diverting his attention to the possible danger on the right, while going 20 miles per hour on 63rd Street between Greenwood and Ellis Avenues under the circumstances.

Defendent says the motorman did not divert his full attention. There can be little doubt from the evidence that the motorman did not

see Cosey, car until a passenger called his attention to it.

We cannot say that the verdict is clearly against the manifestweight of the evidence and for that reason and the further reasons breinabove set forth, the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE ANDWEKE, JJ. CONCUR.

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LIME AN CURKE, JJ. CONCUE.

43483

CLARE J. MURPHY, Conservator of the Estate of MAX PASHKOW, Incompetent,

Appellee,

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THOMAS J. FRIEL and CHARLES C. RENSHAW, as Trustee, etc., et al doing business as CHICAGO SURFACE LINES,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action arising out of the same accident as that in Marron v. Friel, et al, Appellate Court No. 43380. The jury returned a verdict for plaintiff for \$75,000. Defendants made a motion for a new trial, which was denied upon plaintiff remitting \$40,000. Judgment was for \$35,000 and defendants appeal.

The accident occurred January 3, 1944, about 4:45 P.M.

Peter Cosey's Oldsmobile facing east on 63rd Street between

Greenwood and Ellis Avenues, Chicago, Illinois, sought to make a

"U" turn in order to proceed west on 63rd Street. A westbound

street car operated by Defendant McAlmenan collided with the

Oldsmobile which veered southwest and struck an automobile parked

at the south curb of 63rd Street. The parked automobile was thrown

over the curb and across the sidewalk injuring Charles Marron, Jr.

Cosey's automobile then climbed the curb, crossed the sidewalk

and pinned Max Pashkow an incompetent person, against the building.

This suit was begun in his name but a conservator was substituted

for him as plaintiff.

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43483

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Appellee,

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This is a servous injury extica erising out of the same acoident as that in Harran v. Iriel, et al, areal to Court Po. 43580. The jury returned a verdict for alciatiff for 75,000. Defendants made a mation for a new trial, which was souted upon plaintiff remitting .40,000. Judgment was for Te,000 and Schendente appeal.

The accident occurred 3 musry 3, 1985, west 4:65 P.M. Peter Gosey's Oldsaobile facing sest on Görd treat between dreenwood and Ellis Avenues, Chicago, Illinois, sought to make a "U" turn in order to proceed west on Gord Street. A vastbound street car operated by Defendant wellsenan collided with the Oldsmobile which veered southwest and struck an automobile parked at the south curb of Sord Street. The perved automobile was thrown over the curb and across the sidewalk injuring Charles Marron, Jr. Cosey's automobile then climbed the curb, crossed the sidewalk and pinned wax Pashkov an incompetent person, against the building. This suit was begun in his name but a conservator was substituted for him as plaintiff.

The defendants contend that there was no evidence tending to prove that they were negligent under the circumstances or that, should we find against that contention, plaintiff's injury was proximately caused by their negligence.

The circumstances of this case are substantially the same as that in the Marron case. The evidence and inferences here are at least as favorable to plaintiff as in that case. Since we have held there that the questions of defendants' negligence and proximate cause were for the jury we must, accordingly, so hold in this case.

Defendants also contend that the verdict of \$75,000 was so grossly excessive as to be accounted for only by prejudice, passion or a misconception of the evidence. Plaintiff says this question was not raised in the trial court. In their motion for a new trial defendants pointed to the verdict as being excessive, and claimed that the jury was prejudiced. They say that they asked for a new trial, not a remittitur, and that this is still their position.

Pashkow was an incompetent person at the time of the trial. His mental condition is not chargeable to the accident.

He testified briefly, as did another person in his behalf, that he had not worked regularly for about 20 years, but had done odd jobs.

After the accident Pashkow's left leg looked like "a corkscrew". He was taken to a hospital where x-rays were taken of his leg. The x-ray service does not appear to have been very thorough. From the x-rays it would appear the injured leg was placed in a metal cast. Outside of these x-rays there is no evidence of any treatment until Pashkow entered the Veterans Hospital at Downey, Illinois, in August as a mental patient. Though in a mental ward, he was given physiotheraphy treatment for his leg.

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claced in a metal cast. Outside of these x-rays there is no evidence
of any treatment until Pashkow entered the Vetorana Ecspital at
Cowney, Illinois, in August as a mental patient. Though in a
mental ward, he was given physiotheraphy treatment for his leg.

The only effect seemed to be that he was made more comfortable.

He was in a wheel chair from the time of his entrance into the

Veterans Hospital.

Pre-trial examinations showed that Pashkow's left hip, thigh and leg were abnormal; that the left leg between the hip and knee was 4 inches shorter than the right; that the left thigh was 3 inches larger than the right; that the circumference of the left leg below the knee was I inch less than the right; that the left hip and knee were limited in motion; that the nerves and blood vessels had been injured resulting in a cold, clammy feeling and a purplish color of the flesh; that the left knee bends in an incorrect axis; that the left foot is in a dropped condition from non-use and non-support; and that the left leg could bear no weight. The x-rays taken after the accident showed comminuted fractures of the left femur and tibia; fracture of the fibula with displaced bone fragments; the fractures of the tibia running into the kneecap; and an injury to the knee. Pretrial x-rays showed that these fractures had healed improperly. There was malunion and non-union of the fragments, and overriding which induced masses of calcium, causing deformation. The three medical experts offered by plaintiff gave their opinion that the injured leg should be amputated at midthigh. No medical testimony was presented by the defendants.

There is no merit to defendants' contention that the evidence is uncertain on the question whether all of Pashkow's fractures were suffered in the accident. There was evidence that he was in good health before the accident. The pre-trial x-rays do not show new injuries. They show developments in the same injuries pictured after the accident. The one fracture not shown after the accident, shows as an old fracture in the pre-trial x-rays.

The accident occurred in January, 1944. Pashkow was

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The accident occurred in January, 1944. Pashkow was

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admitted to the Veterans Hospital at Downey, Illinois in August. Defendants contend there was no proof of any treatment for the injury during this period. A person who is injured by the tortious conduct of another must use reasonable care and diligence to minimize the damage and can only recover such damages as he could not have avoided by the exercise of reasonable diligence. Cedar Rapids & Iowa City Ry. and Light Co. v. Sprague Electric Co., 280 Ill. 386.

Defendants point to the lack of evidence that Pashkow received proper medical treatment. They say he was admitted to the Veterans Hospital as a mental patient. This is to support their contention that the condition of the leg was neglected. Pashkow was discharged from the army in November 1942 because of a mental ailment, after 2½ months service. He entered the Veterans Hospital suffering from dementia praecox, simple type.

Insane persons are liable for torts they commit. McIntyre
v. Sholty, 121 Ill. 660. We are justified in concluding from C. & A.
R. R. Co. v. Becker, 76 Ill. 25, and 38 Am. Jur. p. 882, that the
question of their discretion, in determining contributory negligence,
is for the jury in each case. There is no case cited nor found
deciding responsibility of insane persons to avoid aggravation or
neglect of an injury. In an intentional wrong a person of low
intelligence may recover damages due to the aggravated condition.
Restatement of the Law of Torts, Sec. 918, Chap. 47. Illustration 4.
We believe we should apply the same rule in determining responsibility
for avoidable consequences as is applied in determining contributory
negligence of insane persons.

Plaintiff's case included the inference, at least, that

Pashkow was suffering from dementia praccox at the time of the accident.

This is enough to take to the jury the question whether he possessed

discretion sufficient to avoid neglecting his injury, and to what extent.

The defendants should have gone on from there.

The only item of expense testified to was the future amputation which plaintiff's medical witness said was necessary.

Plaintiff argues that a person who has a sound mind, though physically

admitted to the Veterane Hospital of Downey, Illinois in August. Defendents contend there was no proof of any treatesent for the injury during this period. A person who is injured by the tarticus conduct, of another must use reseanthle dark end dilly ends to wini ize the damage and can only recover such law ree as he could not lave evolded by the exercise of reseonable dill, coce. Cedar Broids & Yous City Wy. and bight Co. v. Sprague Alectric Co., 880 III. 886.

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incapaciated, might do work requiring only mental effort. He says Pashkow, however, has not that mental capacity and is, therefore, worse off. Defendants say that plaintiff did not ask for special damages and, that any damages claimed on account of his limited abilities, were special, and no claim was made in the complaint for special damages. We disagree. We think plaintiff's argument is directed to support the claim of lost earning power which the complaint is sufficiently bread to scover.

To sustain the judgment of \$35,000 plaintiff points to the reduced purchasing power of money. The question we are considering is whether the case must be retried because of excessiveness of the verdict. Plaintiff by making a remittitur of \$40,000 conceded that the verdict was excessive to that extent.

There is no claim that there was any prejudicial conduct during the trial which would have aroused sympathy or bias in the minds of the jurors. Defendants do contend that Pashkow, sat in a wheel chair with his deformed and useless left leg dangling in a "dropped foot" position which was bound to prejudice their case. They say that had Pashkow been properly treated after the accident, or had amputation been performed before the trial, the jury would not have had the image of him that they had at the trial. We are of the opinion that this is a case in which we must consider the question of the excessiveness of the verdict free from considerations of unfairness in the trial.

It has frequently been held that, where the trial has been fair and impartial, mere excess of allowance in damages may be cured by a remittitur. Wabash Railroad Co. v. Billings, 212 Ill. 37. When a verdict, however, is so flagrantly excessive as to be accounted for only on the grounds of prejudice, passion or misconception, the remittitur does not remove those improper elements.

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Lowenthal v. Streng, 90 Ill. 74. Cases have been cited by both parties where remittiturs have been approved and disapproved. We need not refer to any of those cases.

We believe the verdict of \$75,000 is so excessive that it cannot be accounted for except on prejudice, passion or misconception. The remittitur did not remove these improper elements, so as to give assurance that defendants had a fair trial. We see no merit in plaintiff's contention that crucial facts in the Marron case and in this case are the same and we should consider the question of defendants' liability as settled by two juries. We believe that the defendants are entitled to another trial. This conclusion may, at first, seem harsh. It must be kept in mind that the jury had to decide whether defendants' negligence was the proximate cause of Pashkow's injuries. This required consideration of Cosey's conduct. If the jury was prejudiced in favor of Pashkow, defendants might well suffer an injustice on the question of liability.

Since the case must be retried, we believe we should pass on two remaining points:

Defendants rely upon Chicago City Railway v. Henry, 218 III.

92 to support their claim that the trial court committed error in
permitting a medical witness to testify to the cost of amputation
where there was no evidence that such was required or that there was
an intention of having it performed. In the Henry case there was no
evidence that the operation was not contemplated or required. In
the case before us medical testimony was that the amputation should
be performed, that surgery is "indicated," We think there was enough
in the evidence to justify the estimate of the cost of the amputation.
Moreover, the amount of \$500 is an insignificant part of the verdict.

: emaining opinies:

Lowenthal v. Streng, 90 III. 74. Cases have been cited by both parties where remittiture have been approved and disapproved. We need not refer to any of those cases.

We believe the verdict of 75,000 is so excessive that it cannot be secounted for except on rejulice, passion or ulsconosption. The remittitur did not recove there improper elements, so as to give assumence that defendents had fair trial is seen no merit in plaintiff's contention that cruckel facts in the Narron case and in this case are the ease rnd to thould consider the question of defendents' lightlifty as satuled by two juries. We believe that the defendints are entitled to another trial. This conclusion may, at first, seem harb. It must be kept in mind that the jury had to decide whether derendants' negligence was the proximate cause of Pashkow's injuries. This required accasideration of Cosey's conduct. If the jury was projudiced in favor of Pashkow, defendants might well suffer an injustice on the question of liability.

Defendante rely upon Obicago Oity Sailway v. Henry, 218 III.

22 to support their claim that the trial court coumitted arror in permitting a medical witness to testify to the cost of amputation where there was no evidence that such was required or that there was no intention of having it performed. In the henry case there was no vidence that the operation was not contemplated or required. In the case before us medical testimony was that the amountation should be performed, that surgery is "indicated" we think those was enough a the evidence to justify the estimate of the cost of the suputation.

No. 27. We think that the instruction was proper.

On a retrial the jury should be instructed on defendants' theory, if it is then their theory, that they should be charged with only such damages as were proximately caused by their negligence, if any, as shown by a preponderance of the evidence. This should be consistent, however, with our views hereinbefore stated. We think that defendants' instruction No. 30 was properly refused since it assumes that Cosey failed to exercise care to control his Oldsmobile after the first collision.

For the reasons given the judgment is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

LEWE AND BURKE, JJ. CONCUR.

Completat is made to the giving of plaintiff's instruction we seroper.

On a retried the jury chould be instructed on defendental theory, if it is then their theory, that they chould be charged with only such damages as were proximately caused by their negligence, if any, as shown by a preponderance of the avidence. This should be consistent, however, with our views bereinbefore stated. We think that defendants instruction No. 50 was properly requestince it assumes that Cosey Indied to exercise care to control his Oldemobile after the first collision.

For the reasons given the judgment is nev-road and this cause is remanded for a new trial.

JUDONA . RIENO CAR CRETAVED TEPAOGUE

LEWE AND BURKE, JJ. CONCUR.

43514

JAMES OAKEY KOONTZ,

Appellant,

APPEAL FROM

V a

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, a corporation,

Appellee.

MUNICIPAL COURT

OF CHICAGO.

323 L.A.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for harm which plaintiff claims he and his family suffered because defendant unlawfully discontinued service of gas and electricity in his home. The court without a jury found against plaintiff and judgment was for defendant's costs. Plaintiff has appealed.

Plaintiff in the summer of 1938 lived in Calumet City, where defendant is in the utility business. It had furnished gas and electricity in the plaintiff's 10 room home for 20 years. On July 13, 1938, plaintiff, in financial difficulties, filed a petition in bankruptcy in the United States District Court. He listed a debt of \$10 to defendant. This was an arrearage which had accumulated the previous few months. On August 12 defendant discontinued its service. On September 29, 1938, pursuant to a deposit by plaintiff of \$12.50 the service was restored. Plaintiff and his family were deprived of gas and electricity and were forced to buy meals outside their home during the period of discontinued service. They had no light, hot water or radio during that time.

The issues are whether defendant's action was a coercive measure to force payment of plaintiff's past due bill; whether the cash deposit required by defendant to restore the service was un-reasonable; and whether requisite notice was given plaintiff before the service was discontinued.

43514

JAMLS OAKEY KOONTZ,

Apnellant,

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PUBLIC SERVICE OCHERNY OF MOIT: JW ILLINOIS, a corporation,

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MR. PRESI ING RECTION VIEW YORK

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Flaintiff in the supposed lived in Cliumet City, where defendent is in the utility business. It has furnished gas and electricity in the district 10 read had for CD years. On July 13, 1963, Alaintiff, in financial difficulties, filed a petition in tankruptcy in the United atrice District Jure. He listed a debt of 10 to derendent. This was an eccentys which had accumulated the previous few months. On enguet 18 defendant discontinued its service. On "entember 25, 1933, pursuant to a deposit by pisintiff of 12.50 the service was restored. Flaintiff and his family were decrived of one envious the mentored to buy ments outside their home furing the meriod of discontinued service. They had no light, hot often or rediction of discontinued service. They had no light, hot often or redictions

The issues are whether defendant's action was a soercive measure to force payment of plaintiff's past due bill; whether the cash deposit required by defendent to restore the service was un-reasonable; and whether requisite notice was given plaintiff before the service was discontinued.

On August 29, 1938 defendant sent plaintiff a final bill for the services furnished between July 14th and August 12th.

This bill showed charges for that period of \$2.42. It contained also a charge for previous service for \$12.72 and stated a total amount due of \$15.14. The two larger figures have red ink lines drawn through them. The bill is stamped with a receipt for \$2.42, "on account."

Plaintiff testified that after the service was discontinued a girl employee of defendant demanded that he pay the \$10 arrearage and put up a deposit of \$25 before restoring the service.

After the service was disconnected plaintiff sought, without success, the intervention of the United States District Court.

He then turned to the Illinois Commerce Commission to complain of the demand for the cash deposit. It is clear from the testimony that he did not then complain that defendant was attempting to coerce him into payment of the debt he had listed in his bankruptcy petition. He testified that when he made the payment of the aforementioned bill he tendered the amount paid, telling the cashier that the balance had been taken care of in the bankruptcy; and that he did not remember that she demanded payment of the entire bill.

The Illinois Commerce Commission, General Order No. 109 governing establishment of credits, etc., and defendant's schedules No. 2 and No. G-6 Terms and Conditions for Application for Services are in the record. The general order provides that where a consumer has been delinquent three or more times within the preceding twelve billing periods the Utility may require a cash deposit to establish a credit. Plaintiff contends that defendant demanded a \$25 deposit for restoration of the service and that in any event the \$12.50 exceeded the amount which defendant was entitled to

On August 29, 1938 defendant sent claintiff a final bill for the services furnished between July 14th and August 12th.

This bill showed charges for that period of 1.48. It contained also a charge for provious service for 1".75 and otaled a total amount due of 15.14. The two larger signment area into the lines drawn through them. The bill is standed with a mescint for 2.0", on account."

Flaintiff tectified fact floor for envise was discontinued a girl employee of Cerembert ferended that he say the 10 arrearsge and out up a deposit of Ct before restoring the service. After the service was disconnected eleirfiff wouldt, without success, the intervention of the United Chartes district floor floor. He then turned to the Illinois Johnson Ford alon to constant of the demand for the osth deposit. It is elect from the festiony that he did not then complete that defendent was sittenpoing to coarce him into payment of the foot as held lists in his beturuptey petition. He testified that when ou pade the last by ent of the aforementioned bill he tendened the encunt of the the belance had been twen core or in the constants; and that the cale not remember that she demanded of the same of the same to the entire hill.

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require under the terms of the general order. Plaintiff, immediately after service was discontinued, sought its restoration. He contends that the defendant thereupon demanded a \$25 cash deposit to establish his credit for the future. Defendant's testimony is that it requested a deposit of \$15. Plaintiff introduced in evidence a letter from the Supervisor of the Public Service Division of the Illinois Commerce Commission written to him September 9, 1938. This refers to plaintiff's recent visit and stated that on the basis of the previous 12 month bills "the credit deposit requested - \$15 seems to me to be reasonable. It is in keeping with the Commission's General Order No. 109 \* \* \*. This letter then referred to the information that plaintiff had given, that his future requirements for gas and electricity would be less than the past. It advised plaintiff that as a consequence the Commission had recommended and the defendant had agreed to accept the credit of \$12.50. deposit was thereafter made by the plaintiff and later refunded to him.

Plaintiff says that his service was discontinued without notice or demand and complains that defendant offered no evidence to show that it gave the five day notice required by the general order. In this issue as well as the foregoing issues plaintiff had the burden of proof. He testified that he received no notice, oral or written, before the discontinuation of the service. Defendant's counsel showed plaintiff a document for identification, asking if he had received the original. Plaintiff said he had not. This document was offered in evidence but was excluded on plaintiff's objection that it was a copy and no notice had been served on plaintiff to produce the original.

Defendant's superintendent at Calumet City testified that he had known plaintiff who was a good customer for 20 years and had had many conversations with him before and after the filing

require under the terms of the Accessal order. Plaintiff, immediately after service was discontinued, sought its meetorsting. He contends that the defendent thereuson desended . To such denotit to establish his credit for the future. Derendent's identagon is that if requested a herosit of 15. Haintif, introduced in evilence of letter from the Supervisor of the Sublic Service Siviction of the Illinois Commerce Coumission written to him wotember 9, 1968. This refers to allintif's recent visit and stayed in . on the basis - dis - nearly ar fighter distribute such a nearly month is everyone the esems to me to be resecuable. It is he with the Counistintia veneral Order No. 109 4 \* \*. " Pie letter tren ref reed to the information that lightiff and place, that his future requirements for gas and electricity would be less than the cont. It although plaintiff that as a consequence the Cormicals had recovered and the defendant is exceed to scoot the aresit of 19.50. Tale denosit was therewiter made by he of latiful and befor redunded to him.

Flaintist type that file corplice and since times without notice or demand and complaint and fortables of offered to mideance to show that it gave the five toy notice monitored by the amount order. In this issue as well as the formal and invertible this burden of proof. He toetified that is received no notice, cral or written, before the discontinuation of the convice. Defendant's counsel showed plaintist a document for identification, whing if he had received the original. It intiff all be had not. This document was offered in evidence but are excluded on plaintist's objection that it was a copy and no notice had been served on plaintist to produce the original.

Defendant's superintendent at Calumet City testified that he had known plaintiff who was a good oustomer for 20 years and had many conversations with him before and after the filling

of plaintiff's bankruptcy petition with reference to a cash deposit because of past delinquencies. Plaintiff denied these conversations. We have referred to plaintiff's denial of any written notice. Plaintiff's counsel asked defendant's witness, "Did you give a written notice at any time on a form that his credit - was bad and he would have to make a deposit?" The witness answered, "We did." The substance of the balance of the witness's pertinent testimony was that that notice was given, not by defendant's Calumet City office, but by its Joliet office. This testimony was with reference to written notice after the bankruptcy petition was filed and before the service was discontinued. Not only was there no objection to this testimony but it was elicited by the questioning of plaintiff's counsel. It is true that defendant made no effort to introduce further evidence that the written notice was sent from the Joliet office.

We have pointed out the conflict of testimony on these three factual issues. The court found against plaintiff. The question of credibility of the witnesses was for the trial court. We cannot say the trial judge's decision on these questions is against the manifest weight of the evidence.

Plaintiff complains that defense counsel refused to stipulate to the incorporation of the original transcript of testimony in lieu of a copy thereof and also the court's refusal to grant his motion to effect that convenience. He does not say that refusal of counsel and the court was not their privilege under the Civil Practice Act. Since this is discretionary and no abuse of discretion has been complained of or shown, we need not consider the matter.

For the reasons given the judgment of the Municipal Court is affirmed.

Judgment Affirmed.

LEWE AND BURKE, JJ. CONCUR.

of plaintiff's bankruptcy petition with reference to a cash decorate because of past delinquencies. Plaintiff's build those conversations, we have referred to claintiff's leaful of any critter notice.

Plaintiff's counsel seted different's virious, "Tid or diver written notice at any time on a form that his or dit - and bad and he would have to make a deposition." The mitness alsowed, "Te Bid." The substance of the calcree of the vitness's well can testimony was that that notice was given, not by defendant's Dobret Gity office, but by its Jolist office. This testimony was with reference to written notice after the only was that mean disconsting the service was discontinued. For only was that mean abjection to the tast and factors of this testimony but it was elicited by the rucest also of delicit's counsel. It is true that and factor and the counsel. It is true that and the action of the counsel. It is true that and the action of the counsel. It is true that and the action of the country was each from a difference of the factor. The action of the factor of the country was each from a difference of the country of t

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For the rescons given the justment of the Munich del Court is affirmed.

Judghent Affiraed.

LEWE AND BURKE, JJ. CONCUR.

43644

WILLIAM C. REVIS,

Appellee,

APPEAL FROM

SUPERIOR COURT

EDWARD THOMPSON,

Appellant.

COOK COUNTY.

320 I.A 588

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. The owner of a building and his tenant, a rooming house operator, were both sued.

The tenant Blanche Moss was dismissed before trial by stipulation pursuant to a covenant not to sue, for which plaintiff received \$2,250. The jury returned a general verdict of guilty against Thompson, hereinafter called defendant, and assessed plaintiff's damages at \$5,000. It returned also an inconsistent special verdict. Plaintiff moved to set aside both verdicts and for a new trial. Defendant moved in the alternative for judgment notwithstanding the general verdict or for a judgment pursuant to the special verdict. The trial court granted plaintiff's motions and ordered a new trial. Defendant was granted leave to appeal from that order. Chap. 110, Par. 201 Ill. Rev. Stats.

The building at 6500 Kimbark Avenue, Chicago, Illinois was purchased by defendant in 1931. It was then an old 12 apartment building. After defendant acquired it it was divided into small apartments. In 1939 defendant leased the building and Blanche Moss operated it and collected the rents. She employed plaintiff and his wife and they lived in the building. They collected rents for her and plaintiff did janitor work.

WILLIAM C. RIVIS. HOF I TON .aalleaga TOUGHT TO EDWARD THOM SON. . nay = 13 n innellant.

MR. PRESIDING JUSTICK FILLY SELTY STORMS AND STORMS OF THE STORM

This is a nersonel to juny cotion. The coner of a balloing and his tenent, - ronain, house operator, were both sued. The tenant blanche Woss was displaced before trial by attrubation pursuant to s covenant net to suc, for sule? Reintiff reserve 2,250, The jury returned a concret wordlot if wilty goldnet Thomoson, hereinefter aslief defendert, and sevenee. I latifile damages at s, ort. It returned demages at the note of the verdict. Flaintiff noved to let ast | Loth verilote and for a new trill. Sefendent asked in the elternitive for judgated netwithefanding the general verdict or for a judyment oursuppt to the epocial verdict. The triet court fronted of thirtief a wottons and ordered a new trial. Teleplant as trantia love to count from that order, Chap. 110, Pur. 201 III. Tov. Atata.

The building at 6500 Vinb . venue, daice o, Illinois was purchased by defendant in 1971. It was then an old 18 apartment bling, offer defendant enoughed it it was divided into small apartments. In 1959 defendant leased the building and Flanche Mors operated it and collected the rents. She employed plaintiff and his wife and they lived in the building. They collected rents for her and plaintiff Bid jenitor work. September 22, 1939, plaintiff was injured while on his way to the basement of the building. He opened the door leading from a front hall to the basement stairs. He stepped on to a landing at the head of the steps, "some object" rolled under his foot, he lost his balance and fell headfirst down the stairway into the basement. At the time he was blind in one eye and wore glasses but could see where he was going. There was enough light from the vestibule to light up the landing. During his employment he had used the stairway frequently, sometimes 20 or 25 times a day.

The stairway consisted of 13 stairs. The way between the walls was 3 feet wide. Both walls extended downward as far as the basement ceiling, only the left wall, however, went all the way down to the basement. From the basement ceiling on the right side of the stairway there was a wooden banister with a handrail extending to a post near the bottom of the stairs. There were no handrails on the walls. The stairway was used generally by the tenants going to and from the laundry of the building.

Plaintiff charged several specific acts of negligence in his complaint. He withdrew all, however, except one based on defendant's alleged violation of Chapter 64, Sec. 34/ the Municipal Code of Chicago, 1939. The case went to the jury on the sole charge that defendant had negligently violated that ordinance in failing to provide and maintain a handrail on the entire stairway and that plaintiff's injuries were approximately caused thereby.

Defendant's counsel denied that the ordinance applied; and denied that if it did, any violation was the proximate cause of plaintiff's injury. He contends here in addition that there was no evidence of any negligence on his part and that the circumstances of this case required that the court enter judgment in his favor

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The stairway convisted of 15 stairs. The way between the walle was 7 feet wide. Both walls extended downward as far as the basement ceiling, only the left wall, however, ent all the way down to the basement. From the basement ceiling on the right side of the stairway there was a wooden panister with a handrail extending to a post near the bottom of the stairs. There were no handrails on the walls. The stairway was used generally by the tenants going to and from the laundry of the building.

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Defendent's counsel denied that the ordinance applied; and denied that if it did, any violation was the proximate cause of plaintiff's injury. He contends here in addition that there was no evidence of any negligence on his part and that the circumstances of this case required that the court enter judgment in his favor

because of the special verdict of the jury. The special verdict of the jury was that the absence of the handrail was not the proximate cause of the plaintiff's injury. The inconsistency is apparent from what we said about the condition of the pleadings on which the case was submitted to the jury.

The question before us is whether the trial court abused its discretion in setting aside the verdicts and granting plaintiff a new trial.

The trial under consideration is the second in this litigation. The result of the first trial was a general verdict of guilty against defendant assessing damages at \$1,000; a general verdict of not guilty as to Blanche Moss; and a special verdict finding that the absence of a handrail was not the proximate cause of plaintiff's injury. The trial court granted plaintiff a new trial as to both defendants. Blanche Moss applied to this court for leave to appeal. Leave was denied. (Opinion No. 42346).

There is no dispute in the evidence. Defendant admits that there was no handrail on the stairway above the basement ceiling. He said there had been none since he became owner.

Plaintiff used the stairway many times daily. His foot slipped on something which lay on the landing. He lost his balance and fell down the stairs. The only testimony bearing on the absence of the handrail is plaintiff's statement that he "was trying to catch hold of something to stop my fall."

Plaintiff says there have been two verdicts in his favor and that he should have a trial on the issues. Defendant refers us to the two special verdicts on the precise question of the absence of the handrail constituting the proximate cause of plaintiff's injury.

because of the special verdict of the jury. The special virulation the jury was that the counce of the narried was not the provingte cause of the plaintiff injury. The inconditional is apparent from what we saw about the countition of the case was substitled to the fact that jury.

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The trial unless describeration is the socond in this littigation. The result of the first trial was a gasamal escalet of guilty against depend of a transplay and the first of not guilty against depend of a lander of a social trialing that the obsence of a landeral mot the resolution of plaintiff's injury. The unit court granted about 10 lander to both seventers. Blanche soon a of the to late to both seventers. Blanche soon a office to late court trial as to both seventers as a court to leave to accell. There are the court.

There is no discuse in the evidence, wear about a rise that there wie no handrail on this etaker gross establing. He said there has been about along along a second runar.

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Two juries have found alike on the specific question of defendant's liability arising out of the absence of the handrail. Opposite findings are implicit in the general verdicts, although in the first trial, all charges of specific negligence in the complaint were submitted to the jury. A special verdict controls a general verdict where it is inconsistent with the latter and the court may enter judgment accordingly. Chap. 110, Par. 189, Ill. Rev. Stats.

If plaintiff's testimony at the first trial was substantially the same as in the second, the special verdict there was clearly supported by undisputed testimony as the special verdict is in this case. We believe no good purpose will be served under the circumstances by subjecting defendant to another trial. We see no merit in plaintiff's contention that, while the jury understood the term "proximate cause" as explained in plaintiff's instruction in rendering the general verdict, it did not understand the term in rendering the special verdict.

We need consider no other points.

For the reason given the order of the Superior Court granting plaintiff a new trial is reversed and the cause is remanded with directions to proceed in due course. <u>Kavanaugh</u> v. <u>Washburn</u>, 387 Ill. 204.

REVERSED AND REMANDED WITH DIRECTIONS.

LEWE AND BURKE, JJ. CONCUR.

Two juries have found alike on the specific question of defendent's liability arising out of the absence of the handrail.

Opposite findings are implicit in the general verdicts, although in the first trial, all charges of specific negligence in the complaint were submitted to the jury. A special verdict controls a general verdict where it is inconsistent with the latter and the court may enter judgment accordingly. Chap. 110, Per. 189, Ill.

Rev. State.

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For the reason given the order of the duporior Court granting plaintiff a new trial is reversed and the duporior is remanded with directions to proceed in duc nourse. Usyantuph v. Yeshbura, 887 III. 201.

CHARLES AND CHARGED WIFE DIR. C. II. WE.

LEWE AND BLAKE, JJ. CONCUR.

42054, 42055, 42056 and 42057

BLANCHE S. GIDDENS and CHICAGO TITLE & TRUST COMPANY, as Trustee under the Last Will and Testament of LOUIS M. STUMER, Deceased, ELAINE R. REINHARDT and CHICAGO TITLE & TRUST COMPANY, as Executors of the Last Will and Testament of BENJAMIN J. ROSENTHAL, Deceased, HANNAH ROSENTHAL, GLADYS R. TARTIERE, ELAINE R. REINHARDT and CHICAGO TITLE & TRUST COMPANY, as Trustees under the Last Will and Testament of BENJAMIN J. ROSENTHAL, Deceased, ELSIE S. ECKSTEIN and S. S. KRESGE COMPANY, a corporation,

Plaintiffs - Appellants,

٧.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

734

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

These appeals are from decrees dismissing for want of equity four complaints filed by lessees of the Board of Education of the City of Chicago, seeking to set aside appraisals of six lots, exclusive of improvements, located in block 142, School Section Addition to Chicago. These lots, together with other property in block 142, are known as "School Fund Property." appraisals were made by three appraisers as of May 8, 1935, in pursuance of the terms of certain leases wherein the Board of Education is the lessor and the plaintiffs-tenants are the lessees. Under the terms of these leases appraisals were required to be made every 10 years and the amount of rental fixed at 6% of the value of the lots, For instance, the rental for the 10 year period following May 8, 1935 would be 6% of the value of each of the lots as fixed by the appraisers as of that date. The Circuit Court, after hearing the evidence, found that the equities in each case were with the defendant and decreed that each complaint be dismissed for want of equity. From these

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42054, 42055, 40056 and 42057

Plaintiffs - Appellants,

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MR. JUSTICE FIRST METRY DEPTY FOR FOR A COURT. These appeals are from Georges dismicalng for ment of

county four compleints filled by lassees of the dound of ducetion of the City of Ohlorgo, socking to set saide proveisel of six lots, exclusive of improvements, loughed in block last, chopl Section Addition to Onleave. There lots, to other with this reproperty in block 142, are known as "School Tand Property." The appraisals were made by three appraisant as of 1932, in pursuance of the terms of certain leaser wherein the closes of Mducation is the lessor and the plaintiffs-tenents are the loseces. Under the tirms of there leased appreissly were required to be made every 10 years and the amount of rental fixed at 8% of the value of the lote. For instence, the rental for the 10 year period following May 8, 1955 would be first the value of each of the lote as fixed by the appraisers as of that sate. The Circuit Court, after hearing the evidence, foun' that the equities in each case were with the defendant and decreed that each complaint be dismissed for want of equity. From these decrees separate appeals were taken to this court and were here consolidated for hearing. The sufficiency of the complaints is not questioned. In their essential averments they are substantially the same. In each case the defendant filed an answer, denying the essential averments.

Plaintiffs' theory is that each of the lots was overvalued by the appraisers and that the appraisals should be set aside and the true values determined by the court. Plaintiffs' theory, stated more specifically, is as follows: "(1) Two of the appraisers were disqualified to act because of bias and prejudice. The Board of Appraisers was therefore improperly constituted. reason thereof the appraisal did not comply with the provisions of the leases. The appraisal should have been set aside by the Circuit Court and, upon a charge of overvaluation, that court should have determined de novo the fair cash market value of these lots. (2) The appraisers did not determine the fair cash market value of the lots as of May 8, 1935. Upon the basis of all factual data available, which was exhaustively presented at the trial, it is apparent that the appraisers ignored recognized standards by which the market value of property is determined. (3) The appraisers arrived at values far in excess of the actual market value of the property. Their results could have been reached only by a mistake in the conception of the subject matter of the appraisal (that is, the determination of fair cash market value as distinguished from some theoretical value) or by arbitrarily adopting a valuation which had no relation to market value. (4) It is shown from the evidence presented on behalf of the School Board to the appraisers and to the trial court that if the appraisers, in overvaluing the property, did not act arbitrarily, they made a mistake sufficient to nullify the appraisal in one or eall of

decrees separate access were taken to this court and were here consolidated for hearing. The sufficiency of the corplaints is not questioned. In their essential everwents they are substantially the same. In each case the defendant filed an answer, senting the essential averwents.

Plaintiffs' theory is that each of the late wee overvalued by the appraisers and that the appraisals should be get anical and the true values determined by the court. Plaintiffe! theory. stated more apacifically, in we follows: "(1) from of the angraisers were Claduslift's for the court in line cut regulary. The Board of Appraisant san therefore ignorant, constituted. By reason thereof the someis 1 did not coard; with he orwitators of the leaser. The sopreintly thave ceen interior by the Circuit Court and, untn . charge of overvelestion, that ourt should have determined de nevo the " i. real mestatue of theis (2) The appraisant and not determine the file of market value of the lote as of day 8, 1936. Ugon the larte of ell factual data available, which was exhaustively rresented of the trial, it is soprared that the goneteers ignored are the third et. nd. add by which the market value of presenty te deformine. (3) The appraisers arrived at values for in every. If the return arrest value of the graderty. Their results could have een reached only by a mistake in the conception of the subject netter of the appraised (that is, tile determination of f is osen meruet value se distinguished from some theoretical velue) or by arbitrarily adopting a valuation which had no relation to market value. (4) It is shown from the evidence presented on bohelf of the dehool Board to the appraisers and to the trial court that if the appraisers, in overvaluing the oroperty, did not set arbitrarily, they made a mistake sufficient to nullify the appraisel in one or all of

the following respects: (a) by adopting a theoretical value based on certain computations never used in the purchase or sale of property and having no relation whatever to market value, such as the computations presented by one Fred J. Tucker, the only witness appearing on behalf of the School Board before the appraisers; or (b) by adopting a value designed to produce rentals which the appraisers thought the tenants ought to pay; or (c) by adopting a speculative future value rather than the actual market value on May 8. 1935. (5) The appraisers grossly overvalued the lots to such a degree as to demonstrate that they disregarded known conditions essential to a just ascertainment of value, and that the values found were not the result of unblased judgment, but were the result of arbitrary and wilful acts, which is the 'equivalent of an intention to make a grossly excessive' appraisal. Such gross overvaluations require the setting aside of the appraisals even in the absence of proof aliunde that any one of the appraisers was disqualified or blased. If any one of these grounds be maintained, the appraisals should be set aside and the fair cash market value of the six lots determined by the court in the amounts for which the plaintiffs contend. The defendant's theory, in its essence, is a negation of each of the grounds stated by plaintiffs.

The properties involved are lots 3, 7, 31, 32, 33 and 34, all located on the west side of State Street, between Madison and Monroe Streets in the City of Chicago. They are in the heart of the city's chief retail merchandising district. Each is an inside lot, having a frontage of 24 feet and a depth of 120 feet, to a 15 foot alley running north and south in the rear. We give a brief description of the entire east side of the block as it existed

the following respects: (a) by adopting a theoretical value based on certain computations usver used in the purchase or cale of property and having no relevies whitever to harmet value. such as the computations presented by one feed J. Challer, the only witness appearing on behalf of the labout fourd before the appraisers; or (b) by simpling a vilue limited to the control sentited which the appraisers trought the tenents ought to say; or (a) by edopting a speculables future value arther than it. ictual carket value on May E, 1935. (b) the spritteers trossly avervalued the lote to such a daggee as to leadenthate thit they diagenried thnown conditions essential to a just start insent of value, and that the values found were not the result of unbi- ed judgment, but were the result of erbitrary and wilful set , which in the toquivalent of an intention to make a grosely electival elamination. Such gross overvaluations veculne the settin ....ile of the wormsituis even in the absonce of croof climake that any ore of the capraisers was disqualified or bissed. If any one of the eleverage be called tained, the appraisals should be set unide an! the fair cash market value of the six lote determined by the eront in the sucunts for which the plaintiffs contend. " The defendent's theory, in its escence, is a negation of each of the grounds stated by plaintiffs.

The properties involved are loss 2, 7, 31, 37, 38 and 24, all located on the vest side of State Street, between dedison and Monroe Streets in the City of Chicago. They are in the heart of the city's chief retail merchandising district. Lach is an incide let, having a frontage of 24 fest and a depth of 190 feet, to a lot of the running north and south in the rear. We give a brief description of the east side of the block as it existed

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on May 8, 1935. At the southwest corner of Madison and State Streets is the fireproof Chicago Building, covering lots 1 and 2, with a total frontage of 48 feet and a depth of 120 feet, occupied in the main by offices, but having some retail stores. This parcel is not here involved. Adjoining this property is lot 3, whose value is at issue in this case. At the time of the appraisal it was occupied by the Castle Theatre on the ground floor and the upper floors were occupied by Gately-Wheeler under a sublease from the Castle Theatre, and engaged in merchandising men's wear. Proceeding in a southernly direction the next adjoining lots 4, 5 and 6, (not involved) each having the same frontage and depth as lot 3, were improved by a six story fireproof building, occupied by the S. S. Kresge Company 5 and 10 cent store. Next is lot 7, whose value is involved, which was improved with an old seven story non-fireproof building and occupied by the Red Robin Hosiery Company. Lot 8, (not involved) adjoining lot 7, was improved with a six story old non-fireproof building occupied by Bezarks, engaged in merchandising women's wear and millinery. Next are lots 31 and 32, here involved, improved with a seven story fireproof building occupied by the S. S. Kresge Company, where it conducted a 25 cent to \$1,00 store. Between lots 8 and 31 is an alley running east and west. To the south of lots 31 and 32 are lots 33 and 34, here involved. These two lots were improved with a comparatively new seven story fireproof building, occupied by two subtenants, namely, Maling, merchandising women's shoes, and by Grayson, merchandising women's wear. These two me rehants divided the ground floor. Maling occupied the entire basement and Grayson the entire second floor, and between them they divided the upper floors. Adjoining lot 34, not involved, is the fireproof North American Building at the northwest corner of State and Monroe Streets, occupied by offices and shops,

on May Si 1935. At the southwest corner of Medison and State Treete is the fireproof Chicago Building, covering lots 1 and 2, with a total frontage of 48 feet and a depth of 120 feet, occu ted in the main by offices, but having some retail stores. This carcal is not here involved. Adjoining this property is lot 2, whose value is at issue in this case. At the time of the appraisal it was occupied by the Castle Theatre on the ground floor and the upper floors were occupied by Gately-Aheoler under a sublesee from the Castle Theatre, and enraged in merchandising men's we.r. in a southernly direction the next adjoining lote 4, 5 and 6, (not involved) each having the state frontege and decth as lot 3, were improved by a six story fireproof building, secupled by the S. U. Kreege Company 5 and 10 cent store, sext in lot 7, whose value is involved, which was taproved with an old ceven story non-fireproof building and occupied by the Red Robin Horiery Company, lot B, (not involved) adjoining lot 7, was Laproved with a six story old non-fireproof building occuried by Bezarky, engaged in rereinandising women's wear and millinary. Next are lots 31 and 32, here involved, improved with a seven story firecroof building occuried by the S. S. Kreege Company, where it confucted a 25 cent to .1.90 store. Between lots 8 and 51 is an alley running east and west. To the south of lots 31 and 32 are lots 35 and 34, here involved. These two lots were improved with a comparatively new seven story firegro f building, occupied by two subtenents, nemely, Maling, merobandising women's shoes, and by Grayson, merchandising women's wear. These two merchents divided the ground floor. Maling occupied the entire basement and Grayson the entire second floor, and between them they divided the upper floors. Adjoining let 34, not involved, is the firecrof North American Duilding at the northwest corner of State and Monroe Streets, occupied by offices and shops,

The original leases, dated May 8, 1880, were to expire by their terms on May 8, 1930. Supplemental leases dated June 15, 1888 by their terms expire on May 8, 1985. The leases on the respective lots are substantially the same. The original leases provided for the payment of a stipulated rental from May 8, 1880 to May 8, 1885. As to the rental payable for the remainder of the term, three "discreet male residents of the City of Chicago" were to be appointed by the Board of Education to determine the Ttrue cash value of said demised lots, not taking into consideration the Emprovements thereon, " as of May 8, 1885. For the succeeding five years, to May 8, 1890, the rental was to be 6% of the "true cash value. " as fixed by the appraisers as of May 8, 1885. years thereafter, until the termination of the leases, appraisers were in like manner to be appointed by the Board of Education, and the rental in each case for each succeeding five years was to be 6% of the true cash value so found by the appraisers as of each May 8th. Litigation ensued at the instance of the lesses, over the first appraisal of May 8, 1885. Some time prior to June 15, 1888 a compromise was reached, which resulted in the supplemental leases of that date. The supplemental leases provided that new appraisals should be made as of May 8, 1895, and that appraisals were to be made on each May 8th every ten years thereafter. The method of appointing appraisers was changed. Instead of the Board of Education appointing all three, it was to appoint one, who was to act as chairman. The judge of the Circuit Court (now the District Court) of the United States, Northern District of Illinois, was to appoint a second and a third was to be appointed by the judge of the Probate Court of Cook County. It is to be noted that the tenants have no voice in the choice of any of the appraisers. Since the execution of the supplemental leases, appraisals have been made as of the

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The original leases, doted May 5, 1830, were to excire by their terms on May 8, 1950. Surplemental larger dated June 15, 1888 by their terms expire on May 8, 1986. The leases on the respective lots are substantially tha came. The original leares provided for the payment of a stipulated restal from May 5, 1880. to May 8, 1885. As to the rental payable for the remainder of the term, three "discreet male reclambs of the dity of Cair, we'll wore to be appointed by the Board of Liduestinh to determine the "true each value of said demised lets, not taking lare consideration the Amprovements thereon," as of May 8, 1885. For the succeeding five years, to May 8, 1890, the rental was to be of of the "true cash value," as fixed by the approisers or of thy 8, 1885. tech five years thereafter, until the termination of the leves, appreisers were in like manner to be apprinted by the board of advention, and the rental in each case for each succeeding five years wen to be 6% of the true cash value so found by the corruberrs as of each May 8th. Littention engued at the instance of the lergods, over the first appraidal of May 8, 1885. Fone time orier to June 15, 1886 a compromise was reached, which resulted in the supplemental leases of that date. The supplemental leases provided that new appraisels should be made se of May 8, 1895, and that appraisals were to be made on each May 8th every ten years therester. The asthed of appointing appraisors was diverged. Instead of the Board of Flucati m agpointing all three, it were to appoint one, who was to set as obsings. The judge of the Circuit Court (now the District Court) of the United States, Northern District of Illinois, was to appoint a second and a third was to be appointed by the judge of the Probate Court of Cook County. It is to be noted that the tenants have no voice in the choice of any of the appraisers. Since the execution of the supplemental leases, uppraisals have seen made as of the

following dates: May 8, 1895, May 8, 1905, May 8, 1915, May 8, 1925 and May 8, 1935.

The leases provide the following qualifications of the appraisers: " \* \* \* shall each appoint one discreet male resident of the City of Chicago, not interested as lessee or mortgagee of school property in said city \* \* \*. The function of the appraisers is stated in the fourth paragraph of the supplemental leases as follows: " \* \* \* to determine under oath first duly taken, the true cash value of said demised land at the time of such appraisal, exclusive of the improvements thereon." The fourth paragraph of the supplemental leases also provides: " \* \* \* It is hereby declared by the parties hereto that it is not the purpose of this instrument that the persons appointed as appraisers hereunder, or either of them, shall be the representatives of either of the parties hereto." The fifth paragraph of the supplemental leases

"That notwithstanding anything in said lease or in this supplement thereto contained the persons who shall at any time be appointed thereunder to fix and determine the value of the leased land \*\*\* shall at all times and under all circumstances be held to be appraisers and not arbitrators, and shall not be bound to give notice of their meetings or proceedings to the parties hereto, except as hereinafter expressly provided."

A clause in the original leases provides that lessees shall be estopped from objecting to any matter, thing or proceeding connected with the appointment of the appraisers or their qualifications or action as appraisers, unless such objection be made in writing to the Board of Education and filed with the clerk of the Board within 50 days after the appointment of such appraisers. The supplemental leases provide that the lessee shall be notified by mail of the appointment of the appraisers. The lessees, within 20 days after the mailing of notice, may file with the appraisers a written statement or argument, and the lessor is given the privilege of filing a reply within 20 days after receipt of the lessees' statement or argument. To the lessor's statement or argument, the lessees

following dates: May 8, 1895, May 8, 1905, May 8, 1915, May 8, 1925 and May 8, 1935.

The leases provide the following qualifications of the appraisers: " \* \* \* shall each appoint one discrease male resident of the City of Chicago, not interested as lesses or mortgages of school property in seld city \* \* \* . \* The function of the supraisers is stated in the fourth paragraph of the supplemental lasses as follows: " \* \* \* to determine under oath first duly taken, the 'rus cash value of said demised land at the time of such supressed, exclusive of the improvements thereon." The fourth managraph of the supplemental lesses also provides: " \* \* \* \* It is hereby declared by the parties hereto that it is not the auryose of this instrument that the persons appointed as supraisers arrander, or either of the deals of the representatives of either of the parties hereto." The fifth personaginal of the supplemental lesses parties hereto." The fifth personaginal of the supplemental lesses parties hereto."

"That notwithetanding enything in said leade or in this supplement thereto contained the persons who shall at any time be appointed thereunder to fix and actoraine the value of the leased land \*\*\* thall at all times and under all directed to be appraised and not arbitrators, and shall not be bound to give notice of their destings or proceedings to the parties hereto, except as hereinafter expressly provided."

A olsuse in the original leases order is that leases shall be estopped from objecting to any matter, thing or proceeding connected with the appointment of the appraisant or their qualifications or action as appraisant, unless such objection be made in writing to the Soard of Education and filed with the clerk of the Soard within 50 days after the appointment of such appraisant. The supplemental leases provide that the leases thall be notified by mail of the appraisant, The leases, within 20 days after the mailing of notice, may file with the appraisants a written statement or argument, and the leaser is given the privilege of filling a reply within 20 days after receipt of the leases' statement

or argument. To the lessor's statement or argument, the lessess

may rejoin within 10 days after the receipt of the lessor's statement or argument.

The following provisions of the leases indicate the breadth of the appraisers discretion:

" " " The sole provision of the four preceding provisions is to allow the parties to present to the appraisers information within their possession and their views concerning the value of the demised land. But it is expressly understood and agreed that the appraisers shall not be concluded in any event by the statements so made, but shall be at liberty to seek or obtain such information as they deem pertinent either with or without notice to the parties, and to make their appraisal upon all facts within their knowledge, notwithstanding anything contained in the said written statements above provided for, notwithstanding anything in said lease contained the appraisers shall be at liberty in forming their judgment of the value of the land, without including the value of the improvements thereon, to take into consideration if and so far as they deem it pertinent to do so, the improvements on such land and the character, condition, value, cost, rental expenses and other particulars thereof, and any other facts or information from whatever source bearing upon the question of the actual value of said land, and it shall be the duty of the lessee to furnish appraisers promptly on request a statement showing the rental receipts and disbursements on account of said improvements for five years as near as may be next prededing the time of the appraisment."

In due time appraisers were appointed to make appraisals of school fund properties as of May 8, 1935. Among these properties were the lots in question. The Board appointed George B. Carpenter, a former judge of the United States District Court, Judge James H. Wilkerson, then senior judge of the United States District Court, appointed Paul Steinbrecher. The judge of the Probate Court appointed Wallace G. Clark. The persons appointed by the two judges were in the real estate business with offices in the central business district. Within the time and in the manner provided in the leases, the tenants filed objections to the appointment of Steinbrecher and Clark. The objections were grounded on the claim that both were disqualified. The basis of these contentions were fully stated in the respective objections. After hearings before the respective appointing judges, the applications for reconsider-

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may rejoin within 10 days after the receipt of the lesson's statement or argument.

The following provisions of the leases indicate the breadth of the apprecisors! discretion:

visions is to allow the parties to present to the appreisance information within their rotestion and their views to present to the appreisance the value of the desired land. But it is expressly uniquated and speed that the appreisars shall not be concluded in any event by the statements so made, but whall not be concluded in any event by the statements so made, but whall not it itserty to such or without notice to the parties, and to make their such information as they deam pertinent difficulties with all facts within their knowledge, notwithstanding anythin, contained in the said written stremments convertible anything in said lease contained the spenting anything in said lease contained the spential feath of the related the analy without including the value of the improvements of and any other facts of and any other sects or information from they are therefore contained any other facts or information from the most sure contained any other facts or information from the operation of the desertion of the section from the operation of the deres to turnish annother access the due to the the desertion of the section of the deres to part the security of cold improvements of the residence of a secount of soid improvement for diverse as means on except presents on extended the present of the sector of th

In due time appretuers were evoluted to albe sourcisels of echool fund properties of the lots in question. The scare repointed bears B. Garpenter, a former judge of the United States District court, Judge James H. Wilkerson, then renior judge of the United States District Court, appointed Paul Steinbrecher. The judge of the United States District Court appointed Wallace G. Clark. The persons appointed by the two judges were in the real estate business with officer in the central business district. (ithin the time and in the senner provided in the leases, the tenents filed objections were grounded on the claim that both were disqualified. The basis of these contentions were fully stated in the respective objections. After hearings before the respective appointing judges, the applications for reconsiderences.

ation of the appointments and for the appointment of substitute appraisers were denied. All three appraisers accepted their respective appointments and proceeded to give to lessees notice of the hearings. As contemplated by the leases, Judge Carpenter became Chairman. The lessees filed statements as permitted by the terms of the leases and the lessor filed its several replies. The appraisers then proceeded with the hearings. In due course and within the time prescribed by the leases the appraisers reported the following valuations of the lots, exclusive of improvements, as of May 8, 1935:

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Lot 3 \$525,600 Lot 7 496,800 Lots 31 and 32 1,022,400 Lots 33 and 34 993,600

This gives a square foot value to lots 7, 32, 33 and 34 of \$172, and a square foot value to lot 3, with its corner premium, and to lots 8 and 31, with their alley premium, in excess of \$182 each, Again, in due course and within the prescribed time, the tenants filed their objections, restating those made originally, to the qualifications of the appraisers, and additional objections based on the charge that the respective valuations were excessive. Threats of forfeiture and of imposition of penalties provided for in the leases, were made by the Board. The complaints at bar were then filed, asking that the appraisals be set aside and that the defendant be enjoined from enforcing penalties. Motions for temporary injunctions restraining the Board from imposing forfeitures and penalties were denied, but an order was entered providing that while the tenants (plaintiffs) paid the rent on the basis of the contested May 8, 1935 appraisals, there should be no forfeitures or penalties imposed.

Plaintiffs contend that we should set aside the 1935 appraisal and make an appraisal de novo on two broad grounds,

ation of the appointments and for the appointment of substitute appraisers were deniad. All three appraisors accepted their respective appointments and proceeded to live to lessees notice of the hearings. As contemplated by the lesses, Judge Carpenter became Chairman. The lessees filled statements as permitted by the terms of the lesses and the lessor filled its saveral replies. The appraisars then proceeded with the hearings. In the course and within the time prescribed by the lesses the appraisars the prescribed by the lesses the appraisars and reported the following valuations of the lots, exclusive of reprovements, as of May 8, 1985:

This gives a square foot value to lote 7, 32, 31 and 54 of 172, and a square foot value to lot 2, with its corner previus, and to lots 8 and 51, with their alley noteding, in access if 188 each. Again, in due cource and within the prescribed time, the tenants filed their objections, restating those eads originally, to the qualifications of the appraisers, and additional orjections based on the charge that the respective valuations were eroseitys. Fireats of feriture and of imposition of sensities provided for an the leases, were made by the Board. The complaints at bar were then filed, asking that the appreciaals be set saids ond that the defendant be enjoined from enforcing penalties. Hotions for temporary injunctions restraining the Seard from imposing forfattures and penalties were denied, but an order was entered providing that while the tensuts (plaintiffs) paid the rent on the basis of the contested May 6, 1935 appraisals, there should be no forfaitures or penalties imposed.

Plaintiffs contend that we should set aside the 1925 appraisal and make an appraisal dg novo on two broad grounds.

each of which stands on its own footing: First, that the appraisal was made by an illegally constituted board of appraisers, two of whom were disqualified, and second, that the appraisal was so excessive and so irreconcilable with readily obtainable facts and recognized standards of value as to show that the appraisers acted arbitrarily, committing a constructive fraud, or made a mistake in the conception of their duties. We turn to a consideration of plaintiffs contention that the appraisal should be set aside because two of the appraisers were blased and prejudiced, and were therefore disqualified to act. The objections are directed against Paul Steinbrecher, who was also a 1925 appraiser, and Wallace G. Chark, Clark and J. Milton Trainer were partners for over 40 years under the firm name of Clark and Trainer. While Steinbrecher was an appraiser in 1925. Trainer was a school board value witness in the appraisal of that year. Steinbrecher joined in the appraisal which measured the increase in value between 1915 and 1925 at 80%. Trainer, Clark's partner, sponsored as a witness for the Board these same values in the 1925 litigation. Plaintiffs assert that Clark was disqualified to act as an appraiser because of his partnership with Trainer, which prevented him from exercising his free and independent judgment as an appraiser. The partners had an intimate personal relationship extending over a period of 45 years. They owned real estate in common. Their partnership agreement required that they share equally the expenses and profits of the partnership business. It included a share in fees earned by Trainer as an appraiser and expert witness, and also included the fees Clark charged for his services as a 1935 School Board appraiser,

Trainer was originally employed by the Board as an expert witness in the 1925 litigation in July of that year. A considerable portion of the work done by Trainer was done in the firm's office.

each of which stands on its own footing: Threw, that the appraisal he out, another the constituted board of anothers, two or whom were disquellfied, and second, that the appraisal ses so excessive and so irrecondilable with readily obtainable facts and Sector erestimics wit wait wois of as sulsy to abrehance begingcoor arbitrarily, committing a constructive fraud, or sode a mistake in the convertion of their duties. We turn to a consideration of esucood seles to so blucke Iralagose odi tota doltashoo letilinialo two of the appraisers were binass and prejulised, and were troundors disquelified to act. The objections are lirected whatnet but Steinbrecher, who was also a 1925 appraisar, and call on 0. Clark, Clark and J. Milton brainer were porthere for over 45 years under the firm name of Clark and brainer. While Stainbreaher was an appraiser in 1925, Trainer has a school board value witness in thu appraisal of that year. Steinbresher joined to the appraisal which measured the increase in value between 1915 and 1895 at 80%. Clark's partner, appropried as a whitese for the orand there exame values in the 1925 littlestion. Plaintiffs assert that Clark wes disqualified to sot se en appreiser because of bis ourthersails with Trainer, which prevented the from exercising his free and independent judgment as an appreciser, The partners had an intimate personal relationship extending over a seriod of 45 years. They owned real estate in common. Their partnership agreement required that they share equally the expenses and profits of the northorship business. It included a chare in feer carned by Trainer us an appraiser and expert witness, and also included the feed Clark charged for his services as a 1955 School Board appraiser.

Trainer was originally employed by the Eocrd as an expert witness in the 1925 litigation in July of that year. A considerable portion of the work done by Trainer was done in the firsts office.

Trainer's data were asembled and kept in their office, to which Clark had full access. During Trainer's participation in the 1925 contest, Clark and Trainer were in almost daily and intimate conferences. Trainer was assisted in his work by the Clark and Trainer office staff. Clark attended several of the hearings before the Master. The charges for Trainer's services in the 1925 case were posted on the firm's books and Clark was credited with one half of the fees.

The amount of fees to be paid by the Board was not fixed until after the 1935 appraisers had made their appraisal. In 1934 the School Board applied to the R. F. C. for a loan of \$22,000,000 to pay back salaries of teachers and principals. On June 22, 1934, immediately after the hearings in the 1925 case were concluded before the Master, the R. F. C. employed Trainer to make appraisals of school fund properties in connection with that loan. The lots now in controversy were part of the property so to be appraised. Clark was to share in the appraisal fees. Fred J. Tucker, who also testified in behalf of the School Board in the 1925 case and who was the sole witness testifying before the 1935 appraisers on value for the Board, was the other appraiser appointed to act with Trainer in the R. F. C. valuation.

The data on the R. F. C. appraisals were assembled in the Clark and Trainer office. While Trainer was engaged in making these appraisals, he was in daily contact with Clark. Trainer prepared the R. F. C. appraisal report in the Clark and Trainer office in October, 1934. Trainer discussed the R. F. C. appraisals with Clark and Clark knew of the report which reposed in the partner-ship records. Charges were made on the firm's books for Trainer's services, in which Clark had a one half interest. The hearings in the 1925 case were not concluded until June, 1934. On June 22, 1934 Trainer was employed to make the R. F. C. appraisals. It

Trainer's data were exembled and kept in their office, to which Clark had full access. During Trainer's certification in the 1925 centest, Clark and Trainer were in almost daily and intidate conferences. Trainer was assisted in his work by the Clark and Trainer office staff. Clark attended several of the hearin a before the Master. The charges for Trainer's services in the 1925 case were posted on the firm's books and Clark was credited with one half of the fees.

The amount of fees to be paid by the sorred was not fixed until after the 1935 appraisers had mede their an raisal. In 1934 the School Board copied to the F. P. J. for a loan of 195,000,000 to pay back salaries of teachers and orinolvals. On June 29, 1934, immediately after the hearings in the 1925 orse were concluded before the Haster, the R. F. C. amployed being to make appraisable of school fund properties in connection with that loan. The lots now in controversy were part of the property of the appraisable of the theorem in the supersisal fees. Free J. Lucker, who also testified in behalf of the Pehool found in the 1985 case and who was the sole witness testifying before the 1985 appraises on value for the Board, was the other appraiser speciated to act with Trainer in the R. F. C. valuetion.

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was not until October, 1934 that the appraisal reports were prepared. On February 9, 1935 Clark was appointed as one of the School Board appraisers, less than four months after the R. F. C. appraisals by Trainer and Tucker. The R. F. C. appraisals were made within six months of the 1935 appraisal date of May 8, 1935.

Plaintiffs point out that the firm had been paid for the R. F. C. appraisals, that Clark had shared in these fees, and that he was not at liberty to depart substantially from the 1934 values without reluctance and embarrassment. Plaintiffs state that Clark knew that under the partnership agreement he would be obliged to share his 1935 appraisal fees with Trainer, that since he shared in Trainer's fees and Trainer would share in Clark's 1935 appraisal fees, Clark could not substantially depart from the Trainer-Tucker values, when so short a time intervened between October, 1934 and May 8, 1935. Plaintiffs argue that Clark was not free to exercise the broad discretion reposed in him by the leases, and that Clark had a predilection, whether conscious or unconscious, to sustain substantially the appraisals of his partner, made a few months before.

It is interesting to note that in the 1925 case the values given by Trainer were the values which this court ultimately fixed as the true cash market values as of May 8, 1925. The appraisal date with which Trainer was occupied was May 8, 1925 and the appraisal in which Clark participated took place as of May 8, 1935. Clark did not participate in the R. F. C. appraisal. The report went out over the signatures of Trainer and Tucker. In our opinion, the fact that Clark was a partner of Trainer and that they participated in the fees, did not disqualify Clark of the act as an appraiser.

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Turning to a consideration of the charge that Steinbrecher was disqualified to act as an appraiser, plaintiffs state that he was one of the three 1925 appraisers and that he appeared as a witness in that controversy; that in that contest considerable feeling was undoubtedly engendered; that he was charged with acting arbitrarily, capriciously, as biased, prejudiced, guilty of misconduct, moved by improper influences and acting fraudulently; that the Supreme Court in setting aside the appraisals, made comments on the actions of the appraisers which carried sting: and that the lessees refused to pay the fees charged by Steinbrecher for the 1925 appraisal. The record shows that the 1925 appraisers charged \$10,000 each, or a total of \$30,000, of which \$15,000 was to be paid by the Board and \$15,000 by the lessees. Apparently, the Board paid its share. Most of the lessees failed to pay their share. Steinbrecher's share to be paid by the lessees would be \$5,000. We find that the failure of the lessees to pay Steinbrecher their share of his 1925 appraisal fee did not disqualify him as a 1935 appraiser; nor did the criticism of the 1925 appraisal disqualify him in 1935. Under the charge of disqualification, plaintiffs insist that the proceedings before the appraisers show that Clark and Steinbrecher were biased. We cannot agree with the contention that the proceedings before the appraisers show that Clark and Steinbrecher were biased. We agree that the proceedings before the appraisers show that they were fair and impartial to both lessor and lessees.

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Our courts of review have held that the term "true cash market value" means fair cash market value. It is the price at which a seller, not compelled to sell, is willing to sell, and a price at which a buyer, not compelled to buy, is willing to buy. Plaintiffs urge that the appraisers so grossly overvalued these lots that constructive fraud will be inferred; that the finding

Our courts of review have held that the term "true cach market value" means fair cash market value. It is the price at which a celler, not compelled to sell, is willing to sell, and a price at which a buyer, not compelled to buy, is willing to buy. Plaintiffe urge that the appraisers so grossly overvalued these lots that constructive fraud will be inferred; that the finding

was arbitrary and not the exercise of judgment; that the appraisers disregarded readily obtainable facts; that the appraisal is without basis in fact; and that the appraisers and defendant's experts misconceived the meaning of fair cash market value. Plaintiffs urge that the appraisers mistakenly followed the rule laid down In the Matter of Board of Water Supply of New York, 277 N. Y. 452, of "Fair, economic, just and equitable value under normal conditions," rather than the Illinois rule, and complain that although the appraisal of 1925 gave full effect to an 80% increase in market value over the previous appraisal year of 1915, the appraisers in 1935 allowed only a 13-1/2% reduction from the values fixed in 1925. Defendant replies that a decline in values as of May 8, 1935 was recognized and considered by the appraisers and was fully reflected in their values.

In considering these leases, the Supreme Court in Sebree v. Board of Education, 254 Ill. 438, said (455):

"The rule in this State has been that the findings of appraisers are conclusive upon the parties in the absence of fraud or mistake and will not be set aside merely because the valuation appears too high."

The parties were entitled to an honest appraisal, free of fraud or mistake. The parties presented testimony and exhibits as to every element that could reasonably throw light on the market value of this land as of May 8, 1935. Concededly, this land is very valuable and has never been offered for sale. Only one witness, Tucker, testified as an expert for the Board before the appraisers. As we have observed, one of the appraisers was an able, honest and respected retired jurist, and the other two were real estate men of standing who had a vast experience in appraising real estate in the central business district. Under the leases the appraisers were not confined to the testimony and exhibits presented to them. They were at liberty to seek and obtain such information as they deemed pertinent, and to make their appraisal upon all facts within their

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knowledge, notwithstanding anything contained in the written statements. In no instance have the values as established by the appraisers ever been ultimately reduced. We have carefully studied the voluminous record in this case and are convinced that the appraisers, in finding the fair cash market value of the lots in question as of May 8, 1935, were not mistaken, and that a charge of fraud, actual or constructive, against them, cannot be sustained.

Testimony was presented in support of the assertion of plaintiffs that prospective buyers and sellers of real estate in the central business district were apprehensive of the stability of existing business and rents because of decentralizing forces resulting in the growth of outlying business districts. Defendant opposes this contention. We are of the view that plaintiffs have not established that prospective buyers and sellers of loop property were affected adversely by so-called decentralizing forces resulting in the growth of outlying business districts.

Finally, plaintiffs maintain that the terms of the School Board leases depreciated the value of the land. Two of plaintiffs' witnesses fixed the depreciation at 20% and two at 25%. We are of the opinion, as in Board of Education v. Beck, 293 Ill. App. 630, (abst.) that these leases do not depreciate the value of the land. We are also of the opinion that the leases do not increase the risks to be assumed by a buyer, even though they may lack some of the provisions of other long term leases. There is merit in defendant's contention that the tenants, having entered into these leases of their own free will and through their own negotiations providing for the revaluation method in fixing their decennial rent, are now estopped to assert that the method itself, or any of the other terms of the leases, are factors which they can now

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utilize to their advantage in procuring rent reductions.

For the reasons stated, the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

KILEY, P.J. AND LEWE, J. CONCUR.

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For the reasons stated, the decree of the Chreuit Court of Cook County is efficience.

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MILEN, P. J. A. D. L. I. J. CONTUD.

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JOHN MATTEIS,

Appellee,

v .

EDITH MATTEIS,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

323 P.A. 589

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On March 15, 1944 John Matteis filed a complaint for divorce against Edith Matteis in the Superior Court of Cook County, on the ground that on or about March 10, 1943 she wilfully deserted and absented herself from him without any reasonable cause, and "persisted in such desertion" without any fault on his part for more than one year prior to the filing of the complaint. In an answer she denied the charge of desertion. Following a trial, the court entered a decree finding that the defendant wilfully deserted and absented herself from the plaintiff without any reasonable cause for the space of one year immediately prior to the filing of the complaint; dissolved the bonds of matrimony between the parties; decreed that he pay her attorney's fees in the sum of \$250; that she be awarded all the household furniture and effects of the parties; and that the parties be barred from making or having any claim against each other by virtue of the marital relationship theretofore existing between them. Defendant appeals.

Plaintiff married defendant at Davenport, Iowa on May 16, 1939 and lived with her until March 10, 1943. Although they were married in Iowa, they were residents of Cook County. Previous to their marriage, defendant lived with her mother in the first floor apartment of a two story building at 2101 South 61st Avenue,

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JOHN MATTEL:,

Appellee,

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EDITH MATTELD,

lopellant,

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On March 35, 1944 John ofthis file . consint fire divorce against Maith Nations of the Superior court of Cook County, on the ground that on or shout were 10, 1942 the milfally described and absented bereal? from bir things in moven ble cause, and "persisted in such desertion 'without one alt on his part for more than one year artie to the villing of the god labet. In an answer sile denied the ohre and exception. Collowing of trial, the court entered a degree find no the the defendant Wilfully deserted and absented horself "top the limits without eny reasonable cause for the soace of the year isaeit taly orior to the filing of the complaint; absolved the loads or metrialny between the perties; deareed that we may her withorney! fere in the sum of 1950; that she be severed all the rouse nold exhibiting and effects of the perties; and that the pertien by parties from making or having any claim syminst onch other by virtue of the marital relationship theretofore existing Letween thes. Defendent appeals.

Flaintiff married defendant at asygnort, lows on Ey lo, 1939 and lived with her until March 10, 1943. Although they were married in lows, they were residents of Gook County. Arevous to their marriage, defendant lived with her mother in the first floor apartment of a two story building at 2101 Ecuth Clat Avenue,

Cicero, Illinois. At the time of their marriage this property was owned by Anton Trojan and Ella Trojan, husband and wife, who lived in the basement apartment. Following the marriage of plaintiff and defendant, they beturned to Cicero, where they lived in the first floor apartment at 2101 South 61st Avenue, formerly occupied by defendant and her mother. They lived there until Wednesday, March 10, 1943. No children were born of the marriage. Plaintiff was employed as a clerk in a "hand book." In 1943 defendant was employed in a defense plant located close to her home.

Plaintiff testified that sometimes he paid the rent to the Trojans and sometimes his wife paid it; that he did not remember who paid the rent in January, 1943; that he did not remember having a conversation with Mr. or Mrs. Trojan in January or February, 1943 relative to the Matteis' vacating the first floor apartment; that in conversations with the landlords, they told him that they (the Matteis') could stay there as long as they wished; that they never told him to get out: that Mr. Trojan did not tell him that the Trojans wished to move from the basement to the first floor apartment; that during the first part of March, 1943 defendant told him (plaintiff) that she was going to look for another flat; that he objected; and that "evidently" she found another flat. Asked as to whether he was ever in the flat she moved to, he answered in the affirmative. Asked as to whether he was there on March 10, 1943, he answered: "No." Asked as to whether he had any knowledge prior to the evening of March 10, 1943 that his wife was moving, he answered: "Yes." Asked as to where he acquired that knowledge, he answered: "From her." Asked as to whether he did not help carry "the stuff" out to the moving van, he answered that he did not see

Givero, Illinois. At the time of their marriage tult property was owned by Anton Trojen and Ella rojan, husband and olfs, who lived in the basement apartment. Following the marriage of claintiff and defendant, they returned to Giosco, where they lived it the first floor apartment at F101 South filet werne, formerly occupied by defendant and her wother. They lived there until edicades, Warch 10, 1943. No children were born of the marriage. Interiff was employed as a clerk in a "hand book." In 1915 defendant was employed in a defense clark located close to her now.

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a moving van. Asked as to whether he did not help her move her clothes from their flat to the flat to which she moved, he answered: "I never helped carry no clothes. The only thing is, she was going to move and I asked her not to move, and she had some old rubbish there. I don't know what it was, so I says, 'As long as you are going to move, I will help you, but I never once told her to move." He said he moved "a couple of bushel baskets" of "the stuff" from one place to the other in his car; that he didn't remember helping her to carry her clothes to themnew flat. denied helping her after she got to the new flat; denied connecting the gas stove for her; denied seeing a Mrs. Dunlap at the other flat, and then stated that he didn't remember and that if he did see her, he would not know her. Asked as to what conversation he had with his wife when he left the new flat on March 10, 1943, he answered: "Well, as long as she is leaving, I was going to ask her for a divorce. I told her if she was to move, I was going to get a divorce." He testified further that he moved his clothing out of their former apartment the second or third day after her "things" were moved and that he then went to live with his mother in Melrose Park. He denied that he requested her "to pick out a flat" for him; that he stated that he told her not to move and that they were satisfied where they were. He testified that the parties agreed to call on attorney James C. Soper in Cicero, with whom both of them were acquainted, for the purpose of making a division of money credited to them in a joint bank account; that the amount on deposit was \$1,300; that Mr. Soper's fee was paid out of this account and the balance divided evenly between them; that since March 10, 1943 he has not contributed any money to her support; that since March 10, 1943 he "never" told her that he had a home for her; that since then he has "never" asked her to live with him; that he asked her

a moving van. Asked as to whether he did not belo her move her clothes from their flat to the flat to which she moved, he snewered: "I never helped carry no clothes. The orly thing is, the week going to move and I saked her not to move, and she had some old rubbish there. I don't know what it was, so a says, the long sa you are going to move, I will help you, but I never once told her to move." He said he moved "a couple of bushel bushes" of "the stuff" from one place to the other in his cer; that he didn't remember helping her to carry her clothes to the mew flat. He denied helping her after she got to the new flaf: denied connecting the gas stove for her; denied seeing a Mrs. auniap at the other fist, and then stated that he didn't remember and that if he did see her, he would not know her, Asked as to what convergation he had with his wife when he loft the new flat on Warch 10, 1945, he answered: "Well, as long as she is leaving. I was soing to use her for a divorce. I told her if she was to move, I was poing to let a divorce." We testified further that he moved his clothing out of their former apartment the second or third day ofter her "thinks" were moved and that he then went to live with his mother in .. (lrow Park. denied that he requested her "to sick out . 11: t" for him; that he stated that he told her not to sove and that they were entiried where they were. He testified that the parties agreed to call on attorney James C. Soper in Sicero, with whom both of them were acquainted, for the purpose of meking a division of money credited to them in a joint bank account; that the amount on deposit was \$1,300; that Mr. Soper's fee was paid out of this account and the belance divided evenly between them; that since March 10, 1943 he has not contributed any money to her support; that since March 10. 1943 he "never" told her that he hed a home for her: that since then he has "never" asked her to live with him; that he asked her

to give him a divorce; that since that date the only conversation that he had with her was in requesting her to give him a divorce; and that he never asked her to come back and live with him.

Ella Trojan, who, with her husband, owned and lived in the basement flat at 2101 South 61st Avenue, Cicero, called by plaintiff, testified that plaintiff and defendant occupied the first floor apartment. In answer to the question: "And they moved their furniture out of the apartment that they occupied?" she answered: "They did." Asked as to whether any property was left after the parties moved, she said she didn't go upstairs, and that plaintiff brought the key. She did not know whether plaintiff or defendant had called the moving van. Witness knew defendant prior to her marriage to plaintiff and knew plaintiff from the time of the marriage in 1939. They lived in her building continuously from their marriage until March 10, 1943. Mrs. Trojan testified further that sometimes plaintiff paid the rent and sometimes defendant paid the rent; that prior to March 10, 1943 she told defendant that they (the Trojans) wished to move to the flat on the first floor; that at the time plaintiff returned the key a day or two after March 10, 1943, she (Mrs. Trojan) gave him back some of the rent he paid for the month of March; that they (the Trojans) moved into the first floor flat about three months after March 10, 1943; and that the reason for the delay in moving was that they had to do certain remodeling.

Anton Trojan, one of the joint owners of the building in which plaintiff and defendant lived, called by defendant, testified that he was subpoensed by plaintiff; that in 1939, following the marriage of plaintiff and defendant, he (witness) told plaintiff that they (the Trojans) wanted to live in the basement; that later Mrs. Trojan got sick; that he did not like to live in the basement;

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that he told plaintiff that he would like to have the flat for himself; that after the furniture was moved on March 10. 1943. either the same evening or the next evening plaintiff returned the keys. at which time part of the March rent was returned to plaintiff: that after the first floor flat was remodeled witness and his wife moved into it. At this juncture the attorneys for the parties stipulated that if two named persons were called and sworn as witnesses, they would testify that they were acquainted with plaintiff and defendant; that they separated on March 10, 1943 and that they had been living separate and apart since then. Defendant testified that she treated plaintiff "as a dutiful wife should"; that there were no arguments between them; that sometime in February her husband told her that "we must vacate the flat"; that he told her that was what he was told "by the landlord"; that she went out and looked for a flat; that she found one at 1801 Lombard Avenue, Cicero, Illinois, which was three or four blocks from where they were living; that she told him she had located new quarters and that she made arrangements for moving to the new flat; that she called a van and that the van came on March 10, 1943; that her husband helped her with the packing; that he helped her carry "some things" out, and that he placed them in his automobile; that the movers were there about 9:00 a.m.; that her husband was home at the time; that she did not go to work until 11:00 p.m.; that her husband helped her to get her clothes to the new flat; that he put them in his car; that he then "drove them over:" that he went into the flat with her; that on viewing the flat he remarked: "Of all the dumps I have ever seen, this is the worst;" that he connected the gas range in the new flat; that he was in the new flat between 2 and 3 o'clock in the afternoon before he left for

that he told elaintiff that he would like to have the flot for himself; that after the furniture was noved on March 13, 1945. atthor the same evening or the next evening claimfiff veturned the keys, st which time part of the March rent as returned to cleantifi: of the sid one a setter beleborar sow tell rooft teril oft rette tadt moved into it. At this juncture the attempts for the option sa move has felled man encared boren out it ted beselvatte witnesses, they would testify that they were occupanted with plaintiff and defendant; they they seperated on March 10, 1445 and that they had been living separate and an art of one then. Defendant testified that ere treated plaintair "er e autiful wife should": that there were no arrangetto between the thirth mastine in February her husband told her that "we must res to the flat; that he told ber that was what he was told "by are laralord"; that she went out and looked for a flat; thur sea frund one at 1801 Lombard Avenue, Cicero, Illinote, which are three or four blocks from where they were living; that she that also she a doosted new cuarters and thit she make arrandements for moving to the new flat; that she cailed a van and that the van onne on arch 10, 1045; that her husband helped her with 'ne packing; that he helped her cerry "some things" out, and that he placed them in his sutcorbile; that the movers were there about 9:00 s.r.; that her huseend was home at the time; that she did not so to work until 11:00 c.m.; that her husband beloed nor to set her clothes to the set firt; that he but them in his cer; that he then "draye then cver;" that he went late the flat with her; that on viewing the flat he remarked: "Of all the dumos I have ever seen, this is the vorst;" that he connected the gas range in the new flat; that he was in the new flat between 2 and 5 o'clock in the afternoon before he left for

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his work; that he came back two or three weeks later after she was settled; that he still didn't like the flat; that he did not request her to live with him at any other place; that since the separation she saw him two or three times; and that she went to Attorney Soper's office at the request of her husband. On cross-examination, questioned as to whether she asked her husband to go and look at the new flat before the moving day, she answered in the affirmative, and said he replied: "Time enough when we move." Further on cross-examination she testified that on March 10, 1943 he told her he was moving to a hotel. She denied that he told her that he did not want to move. She stated that prior to March 10, 1943 a complaint for divorce was filed by her.

Mrs. Dunlap testified that she was well acquainted with defendant; that she was not acquainted with plaintiff, but knew him; that on March 10, 1943 she saw plaintiff carrying baskets out; and that on that day she saw him connecting the stove in the new flat. Plaintiff, recalled to the stand, denied that he connected the gas stove in the new apartment; stated that the moving van was at the old place around noon time; and that about 1:00 p.m. he helped his wife carry bundles out to the car. On direct examination, in answer to a question as to whether he took his wife over to the new place, he answered: "I never took her over there." On crossexamination, in answer to a question as to whether he took her clothes over there, he replied: "Took some things over there, not that day - yes, that day, that is right."

Over the objection of defendant the court received as evidence a note which she admitted sending to him shortly after March 10, 1943, reading: "John: You may have all - everything I received from you is yours, including all furniture, money, etc. Please, I want it that way. Your wish is my wish so that shouldn't

his work; that he came book two or three weeks letter often she was settled; that he etill didn't like the flat; that he did het request her to live with him at any other place; that since the separation she saw him two or three tides; and that the went to Attorney Soper's office at the request of her humband. On crose-examination, questioned as to whether one asked has quebead to so and look at the new flat before the nevial day, she nawned in the affirmative, and said he replied: "The enough when we move." Further on crose-examination the cestified that on Varch 10, 1943 he told her he was moving to a hotel. The deated that he did not want to move. She staired that he did not want to move. She staired that or order to do do that he did not want for diverer use filled by her.

defendant; that she was not acquainted with althnish, but knew him; that on March 10, 1945 she new plaintish carrying packets out; and that on that asy one are him connecting the stove in the new flat. Plaintish, recalled to the stand, denied that he connected the gas stove in the new spartment; stated that the moving van war at the old place around now that; and that about 1:00 p.m. he helped his wife overy bundles out to the cer. On direct examination, in ensure to a question as to whether he took his wife over to the examination, new place, he answered: "I never took her over there." On crose-examination, in ensure to a question as to dether he cox there, examination, in ensure to a question as to dether he cox there over there, he replied: "Your some things over there, he replied: "Your some things over there, not that day - yes, that is right."

Over the objection of defendant the court received as evidence a note which she comitted sending to him shortly after March 10, 1945, resding: "John: You may have all - everything I received from you is yours, including all furniture, money, etc. Please, I want it that way. Your wish is my wish so that shouldn't

be so hard. Goodbye and loads of luck. Edith. " It appears from the statement of one of the attorneys that the divorce complaint filed by defendant prior to March 10, 1943 was dismissed. During the hearing defendant stated that she did not want a divorce and lift that she wanted him back. The chancellor asked plaintiff/he wanted "the lady back" and he answered in the negative.

Defendant contends that the decree is contrary to the law and to the manifest weight of the evidence. Plaintiff, to establish the charge of desertion, was required to prove that defendant had absented herself and remained away from him without any reasonable cause and against his will for a period of one year. If married parties separate by mutual consent, there is no such legal desertion on the part of either as constitutes grounds for divorce. Where the plaintiff in a divorce proceeding has, either expressly or impliedly, consented to the original separation or its continuance, and has not revoked such consent, he is not entitled to a divorce for desertion. Larimore v. Larimore, 299 Ill. App. 547. From the time of their marriage until March 10, 1943, the parties lived at 2101 South 61st Avenue, Cicero, where defendant had lived with her mother prior to her marriage. During the time the parties lived together as husband and wife they treated each other with courtesy and respect. There is nothing in the evidence to show that the parties at any time had a quarrel or disagreement, or that either had a complaint to make against the other as to conduct or treatment. The building in which they lived was owned by Anton and Ella Trojan, who occupied the basement apartment. Plaintiff and defendant occupied the apartment on the first floor, The relationship between the parties and their landlords was friendly. At the beginning of the tenancy the Trojans desired to

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live in the basement apartment. In February, 1943 Mrs. Trojan became ill and her husband became dissatisfied with their apartment. Mr. Trojan testified that he told plaintiff that they (the Trojans) would like to have the first floor flat for themselves. About the same time Mrs. Trojan conveyed the same request to defendant. Defendant testified that during the same month she informed plaintiff that they must vacate the flat because of the request so to do by the landlords. She located a flat at 1801 Lombard Avenue, Cicero, about four blocks from where they were living. She testified that she asked plaintiff to come over and look at it and that he said there would be time enough to look at it when they moved. Plaintiff made no effort to obtain another dwelling place. Defendant made the arrangements for moving. Plaintiff helped her with the packing and carried out some things in bushel baskets, which he put in his car, and also drove defendant to the new flat. He told her that "as long as you are going to move, I will help you." He also told her that as long as she was leaving he was going to ask for a divorce. When he returned the keys to the Trojans they gave him back part of the March rent. He then went to live with his mother.

ponderance of the evidence. The evidence shows that the Trojans wanted the first floor apartment, then occupied by plaintiff and defendant. Apparently, because of the Briendship between the landlords and the tenants, there was a willingness on the part of the tenants to comply with the request. The evidence strongly supports defendant's contention that with plaintiff's consent she rented another apartment in the vicinity and moved there. He helped her in the moving and then declined to live with her. He did not offer to make another home for her. In fact, he testified that their only conversation thereafter related to his requests for a divorce. The evidence in this case

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The burden was on plaintiff to prove his case of anomorphisms. The evidence whome that the Trojans wanted the first floor apartment, then occurred by plaintiff and defendant. Apparently, because of the Briendahlp between the landlords and the tenants, there was a willingness on the part of the tenants of comply with the request. The evidence strongly supports defendant contention that with plaintiffs consent she rented another apartment in the vicinity and goved there. He helped her in the moving and contention declined to live with her. He did not offer to aske shother home then. In fact, he testified that their only conversation thereefter related to his requests for a diverse. The evidence in this case

does not establish that at the time of the separation defendant intended to sever the family relationship, nor does it appear that the separation was against the will of plaintiff. Defendant did not move with the intent to break up the marital relationship. She moved because the landlord asked the parties to vacate the apartment. Defendant cannot be charged with desertion because she did not wait to be evicted following a judgment of a court. On the day of the moving plaintiff asked defendant for a divorce and stated that he was going to get a divorce.

In endeavoring to sustain the decree plaintiff relies strongly on the fact that defendant filed a complaint for divorce against him prior to March 10, 1943, and on the note which she sent him shortly after the separation. From her testimony it did not appear that she knew much about the divorce complaint which she filed.. The complaint was dismissed. The record is silent as to why she filed the complaint for divorce and as to why it was dismissed. The fact that she filed a complaint for divorce and then dismissed it, does not lend support to plaintiff's case. If the filing of the complaint for divorce would tend to prove an intent on her part to desert him, then the dismissal of the same complaint would tend to show that she did not want a divorce. The ground asserted in the complaint which she filed is not stated. The note which defendant sent to plaintiff was admissible for consideration by the court. It will be observed that the note states that "your wish is my wish." At that time she knew that he refused to live with her and that he did not want her to oppose a divorce. The fact that she agreed to a division of their joint bank account does not support plaintiff's case. He admitted that they went to Mr. Soper's

does not establish that at the time of the reperation defendant intended to sever the family relationship, nor does it appear that the separation was against the will of plaintiff. Defendant did not move with the intent to break up the marital relationship. She moved because the landlors saked the scriber of vecase the apartment. Defendant cannot be charged with leastfies because the she did not wait to be evicted following: journary of a court.

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office by agreement. Plaintiff has failed to prove that defendant wilfully deserted him without any reasonable cause. We find that the decree is against the manifest weight of the evidence. The decree of the Superior Court of Cook County is reversed and the cause remanded with directions to proceed in a manner not inconsistent with this opinion.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

office by agreement. Plaintiff has failed to prove that defendant wilfully deserted him without any reasonable cause. We find that the decree is against the manifest weight of the evidence. The decree of the Superior Court of Cook County is reversed and the cause remanded with directions to proceed in a manner not inconstant with this opinion.

DECOME THVERSED AND CAUSE REMAINDED THE DIRECTION.

KILEY, P.J. AND LEWY, J. CONCUR.

43155

MARY F. BENTLEY, Administratrix of the Estate of CHARLES E. LINE, SR., Deceased,

Appellee,

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MERCHANTS MATRIX CUT SYNDICATE, INC.,

Appellant.

APPEAL FROM

CIRCUIT COURT

COCK COUNTY.

32 32.4. 539

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action at law for breach of a written contract between Charles E. Line, Sr. and defendant Merchants Matrix Cut Syndicate, Inc., a corporation, which provided that defendant would pay Line \$200 monthly if he refrained from engaging in a competing business for a period of five years within a radius of five hundred miles from the city of Chicago, and that the agreement shall be extended for a further period of five years if defendant "be earning in excess of \$5,000 per year." Line died on December 24, 1943. Upon his death his administratrix was substituted as plaintiff. At the close of all the evidence defendant made a motion for a directed verdict, which was denied. There was a jury trial and a directed verdict for plaintiff, and judgment in plaintiff's favor for \$2,270. Defendant appeals.

The essential facts are uncontroverted. For many years Charles E. Line, Sr., was employed by the defendant, a manufacturer of printer's mats and matrices. On January 3, 1938, Line and the defendant entered into a written contract which recited that Line "is now incapacitated and has now reached an age where it is difficult for him to further carry on the duties incident to his work, and has requested that he be given a pension." Under

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MARY F. BENTLEY, .dministretrix of the Estate of CharLES E. LIFL, SH., Decessed,

Appellee,

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NERGPANES IN TIK OUT SYNCIO.TE, INC.,

Appellant.

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was substituted as plaintiff. At the close of all the evidence
defendant made a motion for a directed verdict, which was denied.
There was a jury trial and a directed verdict for alginitiff, and
judgment in plaintiff's favor for '6,970. Defendant accents.

The cesential facts are uncontroverted. For many years Charles I. Line, Er., was employed by the defendant, a manufacturer of printer's mets and matrices. On January 7, 1938, Line and the defendant entered into a written contract which recited that Line "is now incapacitated and has now resched an are where it is difficult for him to further carry on the duties incident to his work, and has requested that he be given a pension." Under

the terms of the contract, the defendant agreed to pay Line \$200 monthly commencing January 31, 1938, until December 31, 1942, provided he did not interfere directly or indirectly with the business of the company within a radius of 500 miles of the city of Chicago and did not divulge to anyone trade secrets or information relative to the business or its customers, such as price-lists. correspondence and records. Pertinent portions of Section 7 of the agreement further provided "that in the event the said Charles E. Line Sr., has fully complied with the provisions thereof on his part to be performed and has refrained from doing the things which he has agreed to refrain from doing, ..... that the company shall, at the end of the five-year period hereinabove provided, be earning an amount in excess of \$5,000 per year, then this agreement shall be continued and extended for a further period of five years..... It is understood that the salary of the president of the company during such period of extension shall, for the purpose of computing the earnings, be considered to be an expense of the business in an amount not greater than the present amount of the president's salary..... That the payments to said Charles E. Line. Sr., of \$200 per month shall, in any event, cease with the death of the said Charles E. Line. Sr."

Defendant's books of account showed, for the year ending December 31, 1942, total income from sales was \$186,440.14, and net profit \$244.14.

The record discloses that J. Bruce Allen, president of the defendant company, and his wife owned 55 and 45 per cent, respectively, of the stock of the company; that Allen also owned a fishing lodge in northern Wisconsin and 356 acres near Beardstown,

the terms of the contract, the defendant agreed to way Line .800 monthly commencing January 51, 1938, until December 31, 1942, provided be die not interfere directly or indirectly with the business of the company within a radius of 500 miles of the city of Chicego and his not divules to sayone trade secrets or information relative to the business or its customers, such as order-11 to, correspondence and records. Partinent corlors of ection 7 of the agreement further provined "that in the event the ould (hurlos E. Line Gr., has fully compiled with the provistors thereof on the delike egulii end anio ech bautenten and ena paercinea ed of trac he has agreed to refrain from ting, ..... that the comonny andll, at the end of the five-year paring beneficious province, be earning an amount in exceer of .5,000 per year, then this erre ment enall. be continued and extended for a further northed of five years ..... It is understood that the enlary of the oresident of the company during such period of extension shall, for its purpose of consuling the earnings, be considered to be eachier of the outlines in an emount not are then the present amount of the orestent a salary ..... That the payents to said Charles &. .ine, of \$200 per month shall, in any event, cease with Las deeth of the esid Charles b. Line, 'r."

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Illinois, which was used as a duck-shooting ground; that he leased the hunting lodge to the defendant company at an annual rental of \$1500; that he charged to defendant company groceries consumed there, wages of a caretaker, use of an automobile, and railroad traveling expenses for himself and his wife to the fishing lodge and duck-shooting grounds, as well as many other items used at these resorts; that, in addition to his monthly salary of \$1600 as president, Allen received a bonus of \$7,122.50 for services rendered during 1942, without any prior agreement with respect to the payment of a bonus.

Plaintiff's theory is that the defendant company was "earning an amount in excess of \$5,000 per year" at the end of the first five years, thus renewing the contract for a second five-year period. Defendant contends that the parties intended that the word "earnings" meant "net profits," and that the deductions for expenditures shown to have been made in 1942 were usual and customary in the business and known by Line to be such.

In their brief, counsel for defendant argue that the fishing lodge and duck grounds were maintained for the use of customers of the defendant corporation, and that, therefore, all moneys which Allen expended were properly charged as expenses of the business. There was evidence that he did entertain some of his customers in this fashion and that Line knew of it, and that he also knew that Allen had been receiving a bonus. Whether Line knew of these expenditures or bonus payments to Allen, or whether they were justified as proper expenditures by defendant in promoting and holding its business, we think is immaterial, since the contract on its face purports to be a complete expression of the whole agreement, and by the introduction of parol evidence defendant was, in effect, attempting to establish a different contract from that

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expressed in the agreement. (Green v. Ashland State Bank, 346 III.
174, 182.) The intention of the parties to a contract is not
determined by evidence aliunde, but by the language of the contract
itself. (Noll Co. v. Sparks Milling Co., 304 III. App. 624.)
To the same effect see Domeyer v. O'Connell, 364 III. 467 and
Engelstein v. Mintz, 345 III. 48. As pointed out in the Engelstein
case, at page 60: "Courts may not, because a more equitable
result might be reached thereby, construe into a constract provisions
that are not there."

Since the contract was prepared by the secretary of the defendant company it cannot complain because the construction is favorable to the plaintiff. (Massie v. Belford, 68 Ill. 290; McClenathan v. Davis, 243 Ill. 87.)

The word "earnings" in its general acceptation does not mean net earnings, unless qualified in some way. (Springfield Coal Co. v. Industrial Com., 291 Ill. 408, 412; State v. United Electric Light & Water Co., 97 Atl. 857, 859; Smith v. Bates Machine Co., 182 Ill. 166.) In Smith v. Bates substantially the same arguments were advanced as in the case at bar. There the court said, at page 170:

"If, as is now contended, the intention was to limit their liability upon the order to such earnings as might remain after the payment of all expenses of the work, it would have been very easy and most natural that such intention should have been expressed in the writing, and it seems to us that to permit the construction now insisted upon to be placed upon the acceptance would be clearly violative of the rule that the terms of a written agreement cannot be varied or changed by parol."

During the first five-year period of the contract, defendant made monthly payments regularly to Line and, so far as the evidence shows, he complied with all its terms. While he was receiving these payments, Line had no occasion to complain about the expenditures or the payment of bonuses which it is admitted aggregate a sum far in excess of \$5,000. It should be noted that

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174, 182.) The intention of the parties to a contract is not determined by evidence aliands, but by the language of the contract itself. (Noll Co. v. Soarks Millian Co., 304 III. App. 804.)
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the contract expressly provides that the <u>salary</u> of the president of the company during such period of extension "for the purpose of computing earnings" shall not be greater than it was when the contract was executed. We think the absence of any reference to a bonus, coupled with the fact that it was granted by way of compensation for services already rendered, precludes the defendant from charging it as an expense of the defendant's business. (40 A.L.R. 1432.)

The contract in question is neither ambiguous nor incomplete and, therefore, the legal effect of it presented a question of law for the court to determine. (Schneider v. Neubert, 308 III. 40, 43; Knowles F. & M. Co. v. National Plate Glass Co., 301 III. App. 128, 167; McConnaughy v. Gage, 252 III. App. 17.)

For the reasons stated, the trial court properly directed the jury to enter a verdict for the plaintiff, and the judgment entered thereon is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

the contract expressly provides that the salary of the president of the company during such period of extension "for the purpose of computing earnings" shall not be greater than it was when the contract was executed. We think the obscure of any reference to a bonus, coupled with the fact that it was avaited by way of compensation for services already rendered, recludes the defendant from charging it as an excess of the defaultation covers. (40

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For the rements at tel, se intel court processor linested the jury to enter a verdict for the sluthfill, an the jungment entered thereon is affirmed.

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KILEY, I.J. AM. BURYL, J. DONOUR.

43477

THE PEOPLE OF THE STATE OF ILLINOIS.

Defendant in Error,

V.

MARY ROBERTSON,

Plaintiff in Error.

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

323 I.A. 590

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

An information was filed in the Municipal Court of Chicago, charging the defendant, Mary Robertson, with the statutory crime of solicitation to prostitution under the provisions of section 163, chapter 38, of the Illinois Revised Statutes. At the trial defendant pleaded not guilty and waived a trial by jury. The court found that the defendant "did then and there unlawfully, willfully and wickedly solicit to prostitution at 2740 Sheffield Avenue in the City of Chicago, County of Cook and State of Illinois, in violation of section 163, chapter 38, Illinois Revised Statutes of 1941." The foregoing quoted language is the same as the charge in the information. Judgment was entered upon the verdict and the defendant was "sentenced to confinement at labor in the House of Correction of the City of Chicago . . . . for the term of sixty days."

The pertinent part of the statute involved reads as follows: "Any male or female person who shall solicit to prostitution in any street, alley, park, or other place in any city . . . shall be fined not exceeding two hundred dollars or imprisoned in the County Jail or House of Correction for a period of not more than one year or both."

43477

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

.V

HARY MOBERTUON.

Plaintiff in Error.

OF POREL TO TIFF

MURICIPAL COURT

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ME. JUSTICE LEWE DELIVERED PHE OFFICE OF THE COURT.

An information was filed in the Municipal Court of Chicago, charging the defendent, Mary Lobertson, with the statutory orige of solicitation to prostitution under the provisions of section 165, chapter "8, of the Illinois vevised beview bng villus for behasly trebneled faint and to a trial by jury. The court found that the defendent "did then and there unlawfully, willfully and wickelly solicit to prostitution at 2740 Sheffield Avenue in the City of Smicago, Sounty of Cook and State of Illinois, in violation of section 165, phaster 38, Illinois Revised Statutes of 1941." The foregoing tuoted language is the ease as the charge in the information. Judgment was entered woon the verlict and the defendant was "sentenced to confinement at labor in the House of Correction of the City of Chicago . . . for the term of sixty cays."

The pertinent part of the statute involved reads as "Any male or female person who shall solicit to prostitution in any street, alley, park, or other place in any city . . . shall be fined not exceeding two hundred dollars or imprisoned in the County Jail or Hows of Correction for a period of not more than one year or beth." Defendant's principal contentions are (1) that the information is void because it does not charge that the offense was committed in a street, alley, park or other public place, and (2) does not charge facts sufficient to state the crime specified.

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The People maintain in their argument that the information contains all the necessary allegations to constitute the crime charged.

Upon a reading of the statute, it is manifest that this section applies only to persons who solicit to prostitution in public. Whether 2740 Sheffield Avenue is a public place or a private home cannot be determined from the language of the information. In their brief, The People urge that the word "at" means nearness or proximity, citing Kitchel v. Gallagher, 270

Pac. 488, and Smeltzer v. Athanta Coach Co., 160 S. E. 665. In these cases the word "at" was used with reference to street intersections. They also cite Clark County Fiscal Court v. Powell County Fiscal Court, 2 S. W. (2d) 1039. This case involved the location of a bridge site at one of two fords. The facts, as well as the context, in which the word "at" appears in the foregoing cases, are dissimilar, and therefore the cases do not support the People's position.

In the City of Chicago, the use of street numbers (a common practice in deeds or leases) is to designate private property only. Hence, whether the act charged in the information was committed upon a public thoroughfare or upon private property is not clear.

The information also fails to state the name of the person solicited. In the People v. Rice, 383 Ill. 584, at 588, the court said:

Defendant's principal contentions are (1) that the information is void because it does not charge that the offense was committed in a street, alley, perk or other public place, and (2) does not charge facts cufficient to other the orime specified.

The Feorle mointain in their accurent that the information contains all the necessary allegations to constitute the crime charged.

Upon a resoling of the strute, it is varifeet that this section applies only to be recome who solicit to prostitution in public. Whether 2750 Sheffield Avenue is a bublic place or a private home cannot be determined from the language of the information. In their brief, The secole urge that the word "at" means nearness or proximity, eiting Fitchel v. Fellaner, 570 Pac. 488, and Smeltzer v. Attants Cosch Co., 180 S. 1. 638. In these cases the word "at" was used with reference to street intersections. They also cite Glerk Grunty Fitcel Count v. Evenly Gounty Fiscel Count, 2 T. V. (2d) 1069. This area involved the location of a bridge site at one of two forcs. This frate, as well as the context, in which the word "at" access in the forcegoing cases, are dissimilar, and therefore the cases do not support the People's position.

In the City of Criosgo, the use of street numbers (a common practice in deeds or leaces) is to designate private property only. Hence, whether the act charged in the information was committed upon a public theroughfare or upon private property is not clear.

The information also fails to state the name of the person solicited. In the feople v. Aice, 385 Ill. 584, at 588, the court said:

"Further considering the sufficiency of the separate counts of the indictments, it will be noted that each count one alleges solicitation to prostitution 'upon the public streets or other place of the City of Champaign. It does not allege the name of a person or persons solicited nor describe the streets or place. The rule is well settled that an indictment for a statutory offense, especially when the offense is a misdemeanor, charging the facts constituting the crime in the words of the statute, and containing averments as to time, place, persons and other circumstances to identify the particular act charged, is

good as a pleading and justifies putting the defendant on trial.

"Section 9 of the Bill of Rights provides that in all
criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him, The purpose of this guaranty is to secure to him such specific designation of the offense laid to his charge as will enable him to prepare fully his defense and to plead the judgment in bar of a subsequent prosecution for the same offense." (Italics ours.)

To the same effect see The People v. Chiafreddo, 381 Ill. 214; The People v. Cook County Distributors, 321 Ill. App. 394, at 398.

In the instant case the information is not only vague and indefinite as to the place where the offense was committed, but also fails to name the person solicited.

> For the reasons stated, the judgment is reversed. JUDGMENT REVERSED.

KILEY, P.J. AND BURKE, J. CONCUR.

"Further considering the sufficiency of the sentrate one favo code that lates ed if tw fi , and to the the to the alleges solicitation to progtitution 'upon the public stracts or other place of the City of Chambaign. It does not allege the name of a person or persons solicited nor describe the streets or place. The rule is well settled that an indictment for a statutory offense, especially when the offense is a signessor, oberging the facts constituting the orime is the words of the statute, and containing evergents as to time, place, persons and other circumstances to identify the perticular act abraged, is good as a pleading and justifies outting the defendant on trial. Beetion 9 of the Bill of Pights provides that in all criminal prospections the soqueed shall have the tide to demand the nature and sause of the secusation against him, The urpose of this guaranty is to seeure to him such specific feet, graftion of the offence laid to his charge as will chable him to urecare fully his defence and to blead the judgment in her of a rubsecution prosecution for the sawe offense," (Italian ours.)

To the same effect see <u>in Fords</u> v. <u>Ominfraddo</u>, CSl III. 214; The People v. Cock County Cathibutors, ESL III. Acc. 504, at 598.)

In the instant asse the inicensiins is not only value and indefinite so to the elective when the offerse were sommitted, but also fails to name the person collected.

For the reasons stated, the judgment is coversed. Juper the P. F. Ser. T. Ser. T.

KILEY, P.J. AM BYTAR, J. CONSER.

43592

In the Matter of KATHLEEN RICHARDS, a Dependent Girl, PEOPLE OF THE STATE OF ILLINOIS,

Petitioner and Appellee,

V.

EMORY HERRON.

Respondent and Appellant.

APPEAL FROM

CIRCUIT (JUVENILE)

COURT.

COOK COUNTY.

328 K.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal, respondent, Emory Herron, seeks to reverse a final supplemental decree of the Circuit (Juvenile) Court denying the counterclaim of respondent praying for the custody and control of his illegitimate child under Section 13 of Chapter 17, Ill. Rev. Stats. 1943. Respondent appealed to the Supreme Court, where the cause was transferred to this court.

On June 5, 1940, Irene McMahon, an assistant probation officer of the Juvenile Court, filed a petition in that court praying, inter alia, that Harry Hill, chief probation officer of the Juvenile Court, be appointed guardian of Kathleen Richards, child of Marion Richards. On January 27, 1941, a decree was entered in conformity with the prayer of the petition. Afterward, on May 12, 1942, Margaret C. Lyman filed a supplementary petition similar in content to the one filed June 5, 1940 by Irene McMahon. The gist of the supplementary petition is that Kathleen Richards, a female child, was born on February 14, 1940; that the child is in the custody or control of Mr. and Mrs. Charles Brady; that the alleged father of Kathleen Richards is Emory Herron; that the mother, Marion Richards, is wholly unable to care for, protect, educate, control and discipline her child, by reason whereof she has become and is a dependent; that the mother consents that a guardian over the person of the child be appointed, and that the

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In the Matter of MATHER N RICHLES,

a Dependent Girl, PROPLE OF RIG

STATE OF ILLINOID,

Fetitioner and A pelies,

v.

EMORY HERROW,

Respondent and Superlant.

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Court denying the counterlaid of reservables about the time to custody and control of piece in the country of piece in the country. The time as a set of the country itself. The first country is a set of the country the supreme Count, where the country country ware of the country.

On June 5, 1740, Irene Wilher, a waite to the polition officer of the Javanile 2 per, fills a fitting in that court preyles, inter alls, that Harry Will, chist archates a willcor of the Juvenile Court, be southined ermit a of this at doburds. child of Marion Scharfe. On Jenury '7, 1941, a sevien Fac entered in confermity with the war of the resition. afterwar, on May 12, 1945, Virgorat C. Crash filter and releast of a titles similar in content to the one filler June :, 1840 by arene rokahan. The gist of the supplementary settion is that titleen Michards, a female child, was born on Pagrany 14, 1340; that the child is in the custody or control of Mr. and Prs. Churler array; that the alleged father of Kathleen .ich mir is meory Berron; that the mother, Marion Michards, is wholly untile to care for, orptect, educate, control and discipline her child, h reason whereof she has become and is a dependent; that the nother consents that a guardian over the person of the child be suppinted, and that the guardian be authorized and empowered to assent to the legal adoption of said child. The concluding paragraph prays that some suitable person be appointed guardian over the person of Kathleen Richards and authorized and empowered as such guardian to assent to her legal adoption.

Respondent's answer avers that in a cause entitled People of the State of Illinois ex rel. Marion Richards v. Emory Herron, the Municipal Court of Chicago, on December 11, 1940, entered judgment finding respondent to be the putative father of said Kathleen Richards; that under the law of the State of Illinois commonly referred to as the Bastardy Act, Chapter 17, Smith-Hurd Annotated Statutes, the respondent is entitled to the custody and control of Kathleen Richards; that respondent is gainfully employed and earns sufficient wages to provide suitable care, maintenance, education and guardianship of Kathleen Richards; that he is a married man living with his wife in a respectable neighborhood in the City of Chicago; that his wife has expressed willingness to receive the child in their home as a member of the family of the respondent; that the respondent does not consent to the adoption of the child by Mr. and Mrs. Charles Brady, Respondent's counterclaim concludes with a prayer that the care, custody, control, education and guardianship of his minor child Kathleen Richards be given to him as is provided by law.

Petitioner's answer to the respondent's counterclaim avers that in the bastardy proceeding in the Municipal Court the respondent pleaded not guilty and denied under oath at the hearing that he had ever had sexual relations with the mother Marion Richards; that the respondent was ordered to pay the sum of \$1100 for the support and maintenance of said Kathleen Richards, payable at the rate of \$200 for the first year and \$100 per year thereafter for nine years, in accordance with Illinois statutes concerning

guardian be authorized and empowered to assent to the less and adoption of spid child. The concluding paragraph prays that some suitable paraon be suppliced guardian ever the screen of Kathleen Richards and sutherized and empowered as such juridian to assent to her legal adoution.

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bastardy; that he has never contributed to the support of Kathleen Richards and still refuses so to do; that as a result of the respondent's refusal to contribute anything to the support of the child, the mother, Marion Richards, was unable to keep her child; that the Bradys have given the child a good home free of any expense to the public or to the mother, and that the Bradys now wish to adopt the child.

After extended hearings, the trial court, on July 31, 1944, entered a supplemental decree which found that Emory Herron, the natural father, has no right to the custody of the child by virtue of Section 13 of the Bastardy Act; that it is for the best interests of the child and of The People of the State of Illinois that Kathleen Richards remain under the guardianship of Harry Hill, chief probation officer of the Juvenile Court, under the decree heretofore entered in this cause on January 27, 1941; that Mr. and Mrs. Charles Brady, with whom the child was placed under the original decree, are fit and proper persons to continue to have the custody of the child and to adopt it in accordance with the statute in such case made and provided; and that the natural father, Emory Herron, is not entitled to have the guardianship order here-tofore entered herein vacated and set aside.

Respondent's principal contention is that since he was adjudged to be the putative father of the bastard child, and the mother having relinquished the custody of her child, the court should have given the custody to respondent on the ground that the respondent and his wife offered a fit and proper home for the rearing of the child. In this brief respondent's counsel does not complain that the findings in the decree are against the manifest weight of the evidence, but he argues in effect that respondent as the natural father has a right under section 13 of the Bastardy Act to the custody of his child superior to that a parent would have, when the question of custody is controverted, of a child

bastardy; that he has never contributed to the supert of wetbleen dichards and still refuees so to do; that as a result of the respondent's refueal to contribute enything to the suspic of the child, the mother, Merion Richards, was unable to keep her child; that the Bradys have given the child a good contribe of any expense to the public of the mother, and that the short the child.

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Respondent's reinstral contention is this since he was adjudged to be the sutative father of the setant child, and the mother having relinquished the quetody of her child, the court should have given the custody to respondent on the ground that the respondent and his wife offered a fit and proper home for the rearing of the child. In this brief respondant's counsel does not complain that the findings in the decree are against the namifest weight of the evidence, but he argues in effect that respondent as the natural father has a right under section 15 of the Bastardy at to the custody of his child superior to that a parent would have, when the question of custody is controverted, of a child have, when the question of custody is controverted, of a child

born in wedlock.

It is urged by The People that where a controversy surrounds the custody of a bastard child, though the right of the parents exists, a paramount consideration is the best welfare of the child itself.

In <u>The People</u> v. <u>Weeks</u>, 228 Ill. App. 262, 268, this court, in adverting to <u>The People</u> v. <u>Porter</u>, 23 Ill. App. 196, said:

"In controversies of this character, three matters are to be regarded; the rights of the parent, the rights and interests of the person or persons to whom the care and custody of the infant child has been given by the parent, and the welfare of the child; and of these three the last mentioned is the matter of primary and paramount importance."

To the same effect are <u>The People v. Nelson</u>, 235 Ill. App. 410, 415, 416; <u>Cormack v. Marshall</u>, 211 Ill. 519, 527; and <u>Sullivan v. The People</u>, 224 Ill. 468, 477.

The evidence shows that in the proceedings before the Municipal Court the respondent denied paternity of Kathleen Richards and contested the bastardy proceedings. After judgment was entered against him he refused to pay any support money due under its terms. In the original Juvenile Court proceedings instituted June 5, 1940, respondent did not enter an appearance or file an answer. sworn answer to the present petition, which was filed May 12, 1942, he again denied the paternity of Kathleen Richards. During the proceedings in the Municipal Court and in the Juvenile Court, respondent was living with his wife. Although respondent was gainfully employed except for a few months prior to April 1941 and had an equity of about three thousand dollars in his home, he and his wife made joint contributions to the mother of the child aggregating about \$15.00. Since 1941 the Bradys have shown a marked devotion to Kathleen Richards. They own the house in which they live. Mr. Brady is employed as an engineer, and his wife looks after her household duties.

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In The People v. derre, 220 III. 1 p. 662, 233, this court, in adverting to The People v. Loren, 22 IVI. 2 a. 198, said:

"In controversies of thi character, heres rotters era to be regarded; the rights of the nament, the rights and interacts of the person or persons to whom the care and outhody of the line intent child has been given by the provint, and the well use of the child; and of these three the last centioned is the astier of original care paramount importance."

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three thousand follars in his home, he and his wife made joint contributions to the mother of the child aggregating about 15.00.

Since 1941 the Bradys have shown a marked devotion to Kathleen Richards. They own the house in which they live. Mr. Brady is employed as an engineer, and his wife looks after her household duties.

Respondent has never had custody of his child. From the trial court's written opinion (Abst. 76) it appears that all the evidence adduced was carefully considered by the court in determining the best interests of the child.

In our opinion there is ample evidence to support the findings and decree. Application of the principles announced in the cases hereinabove cited makes respondent's position untenable.

For the reasons stated, the decree is affirmed.

DECREE AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

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In our ofinion there is sable evidence to surrors the findings and decree. Application of the extredible acres hereinsbove cited askee resonnent's portion untenrile. For the reasons atsted, the degree is a irmed.

DESCRIPTION OF THE

XILHY, P.J. AND BURNE, J. DOWNER.

43668

EDWIN M. HADLEY, JR.,

Appellee,

APPEAL FROM

ERNEST E. LILLIANDER, et al.,

Defendants.

SUPERIOR COURT

COOK COUNTY.

On Appeal of WILLIAM H. MURPHY and HENRY F. HAGEMEYER,

Appellants.

32

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a second appeal of this cause, which was reported in Volume 327 Ill. App. 224, General Number 43119.

Reference to that decision will show what the facts in the case are without repeating them here. Atlantic Casting & Engineering Corporation, a corporation, issued three certificates of stock for 839 shares each in the names of plaintiff and defendants Murphy and Hagemeyer, respectively. In the original decree it was provided that the Clerk of the Superior Court deliver one of the certificates to plaintiff and one to each of the defendants upon payment to plaintiff by defendants or either of them of the amount provided in the decree and, in the event of failure of the defendants to make such payments, plaintiff be declared the absolute owner of the stock.

In this court the original decree was substantially affirmed in all respects except that the chancellor was directed to add a provision to the decree providing for the sale of all the stock in a block. After the mandate of this court was issued, the cause was reinstated in the Superior Court and several hearings were had before the chancellor. On December 5, 1945 an order was entered by the chancellor amending the original decree pursuant to our opinion.

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EDWIN M. HADLEY, JR.,

to our opinion.

Appeller,

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ERNEST E. LILLIANDER, et el.,

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On Appeal of SILITAN S. MURSHY and REMEY F. HAGENILYLS,

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MP, JUSTICE ILES DELLY FORD THE DESIGN OF DEL BOURT.

This is a second crosed of this course, which was reported in Volume S27 Ill. Agn. 224, Ceneral Suchection will allow what the feats in the core deference to that decision will allow what the feats in the core dre without repeating them here. Atlantic Sasting & Engineering Corporation, a corporation, december of three centuits and defendants for 859 shares each in the names of elintist and defendants. Among and Hagereyer, respectively. In the cripinal decree it was provided that the Clerk of the Sucrice Sourt deliver one of the certificates to electific and one to each of the defendants amount provided in the decree and, in the event of filure of the defendants to make such payments, plaintiff be declared the absolute owner of the stock.

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On December 17, 1945, defendants filed a petition praying that the order of December 5, 1945 be modified by continuing the date for sale in block of the stock in question and further extending the time set to retire the lien of the plaintiff against the certificates of stock issued in the names of the defendants. The chancellor denied the petition, and defendants bring the instant appeal.

The record discloses that during the several hearings prior to the entry of the order of December 5, 1945, the plaintiff furnished the defendant certain balance sheets purporting to show the financial status of Atlantic Casting & Engineering Corporation; that in recent months the corporation had suffered serious financial losses; that the plaintiff had charged the costs of the present litigation, amounting to \$21,576.50 to the corporation; and that the books of the corporation also show an item of \$28,150.00 for accrued directors fees. Defendants contend that the order of December 5, 1945, amending the original decree, did not give them ample time or opportunity to make a complete investigation of the financial status of Atlantic Casting & Engineering Corporation for the purpose of making an intelligent bid for the stock. It is urged by plaintiff that the sole question presented for determination is whether the chancellor complied with the mandate of this court.

The law is well settled that when a case is remanded by this court with specific directions the court below has no power but to carry them out (<u>Union Nat. Bk. v. Hines</u>, 187 Ill. 109, 114), and the chancellor may take only such proceedings as conform to the judgment of the court of review. (<u>The People v. Finnegan.</u> 350 Ill. 109-112; <u>Tribune v. Emery Motor Livery Co.</u>, 338 Ill. 537-540; <u>Crozier v. Ereeman Coal Mining Co.</u>, 363 Ill. 362-390.)

On December 17, 1945, defendants filed a setition praying that the order of December 5, 1945 be modified by continuing the date for sale in block of the etock in question onlyabler extending the time set to retire the lies of the clintiff retiret the certificates of atock issued in the names of the defendants. The chancellor denied the nethtion, and defendants brin. The instent appeal.

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Whether Atlantic Casting & Engineering Corporation was mismanaged by the plaintiff or other officers of the corporation as charged by the defendants was not before the chancellor in the present proceeding. The record discloses, however, that the chancellor did endeavor to obtain for the defendants the information they requested relative to the financial status of the corporation, without going too far afield. After hearing all the testimony in the former proceeding as well as that adduced in the instant case, the chancellor fixed a time which he regarded as reasonable under all the surrounding and attendant circumstances.

Unless we can say that the evidence clearly shows an abuse of the discretionary power granted the chancellor under the mandate in our former opinion, this court would not be warranted in disturbing the order of December 5, 1945, amending the original decree. In our opinion, from a careful reading of the record in this case, the evidence does not justify a modification of the order of December 5, 1945 as prayed for in defendants, petition.

For the reasons given, the order is affirmed and its provisions should be carried out within a time to be fixed by the chancellor.

ORDER AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

Whether Atlantic Casting & Engineering Corporation was dismanaged by the plaintiff or other officers of the corporation as charged by the defendants are not before the chancellor in the present proceeding. The record circloses, however, that the observation did endeaver to obtain for the iefendants the information they requested relative to the financial status of the corporation, without going too far ifield. After hearing all the testisces in the former proceeding a well as that safured in the instant over, the chancellor fixed a time which he reported of resconding and attention are all the surrounding and attention circumstances.

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For the reasons given, the order is affirmed and its provisions should be service but within a time to be fixed by the chanceller.

ORDER CHEROLO.

KILEY, P.J. AND BUEKL, J. CONTUP.

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Z. S. MANCOU and B. R. MANCOU.

Plaintiffs - Appellees,

V .

THE TRUST COMPANY OF CHICAGO, a corporation of Illinois, as Trustee under Trust Agreement dated April 12th, 1945, and known as Trust No. 4564, CHICAGO TITLE & TRUST COMPANY, a corporation of Illinois, as Trustee under Trust Deed recorded as Document No. 13495971, BERNARD STEINMAN and FRANCIS L. DAILY,

Defendants - Appellees, S. M. HOMAN and ROSE Y. HOMAN,

Defendants - Appellants.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order entered on pleadings and evidence, on January 11, 1946 appointing a receiver for an apartment hotel located at the northwest corner of Indiana Avenue and 24th Street in the City of Chicago.

On December 26, 1945 plaintiffs filed their bill of complaint alleging in substance that plaintiffs and the Trust Company of Chicago, a corporation, as Trustees under a certain trust agreement, are the owners of a seven-story brick building located at the northwest corner of Indiana Avenue and 24th Street, in the City of Chicago, containing 384 rentable hotel apartments; that one Bernard Steinman holds a tax certificate for \$17,000 which he claims is a lien on the premises; that the Trust Company of Chicago holds an undivided one-half interest in the premises for and on behalf of the Homans; that from April 12, 1945 to December 8, 1945 the premises were managed by plaintiff B. R. Mancou, that on December 8, 1945 defendant S. M. Homan forcibly ousted B. R. Mancou from the premises and the management thereof

Z. S. MANCOU and B. S. ASNCOU,

Plaintiffs - inpelleee,

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Defendents - Augellege,

S. M. HOWAR snd Forth ", Points,

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This is an interlocatory of ect from norm relieved on plendings and evidence, on January 11, 1003 abouthing a receiver for an apartment hatel located at the northwest corner of Indiana avenue and SAth Street in the Sity of Onic go.

On December 23, 1946 plaintiffs filed their bill of complaint allesing in succtince that claintiffs and the Trust Company of Chicago, a correction, as rustess under a certain trust agreement, are the compare of a rever-story price building located at the northwest corner of lusient venue sud Sath Treat, in the Oity of Chicago, containing 384 resituals hotel apartments; that one Bernard Steinman holds a tay certificate for 17,000 which he ciries is a lien on the creaters; that the Trust Company of Chicago holds an undivided one-half interest in the premises for and on behalf of the Homans; that from world 12, 1945 to December 8, 1945 the oremises were managed by plaintiff B. R. Mancou, that on December 8, 1946 defendant C. M. Homan Corciolly ousted B. R. Mancou from the premises and the management thereof

and discharged all the clerks and other employees retained by plaintiff; and that he is now in possession and collecting all the rents, issues and profits of the premises. The bill concludes with a prayer for a partition of the premises, attorney's fees, and general relief.

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On January 8, 1946 plaintiffs served notice that they would appear before the chancellor and move for the appointment of a receiver in accordance with the prayer of their petition, a copy of which notice and petition was served on defendants' counsel. On January 11, 1946, when the matter came on for hearing, the plaintiffs presented their petition for the appointment of a receiver and the Homans filed instanter their answer to plaintiffs' petition and an answer to the complaint.

Plaintiffs' verified petition for the appointment of a receiver alleges that the premises in question were purchased on April 12, 1945 on behalf of the plaintiffs and the Homans; that until the 8th day of December, 1945 plaintiffs were in actual possession thereof for themselves and the Homans; that on the 8th day of December, 1945 the Homans entered the premises with the aid of other persons whose names are unknown, and forcibly evicted the manager, bookkeepers and other employees; that they posted certain individuals at the entrance of the premises who warned plaintiffs and the employees to keep away from the premises and refused them access or possession thereto; that there are numerous unpaid bills: that checks were issued which were returned marked "insufficient funds"; that various tenants have refused and failed to pay rent; and that the Homans have failed to maintain the premises and are permitting waste and dissipation of the income from the premises. The prayer was for an order to be entered appointing a receiver.

and discharged all the clerks and other employees retained by plaintiff; and that he is now in possession and collecting all the rents, issues and profits of the premises. The bill concludes with a prayer for a partition of the promises, attorney's fees, and general relief.

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After denying substantially all of the allegations of the petition for the appointment of a receiver, Homans in their joint and several answers admit that S. M. Homan is now in physical possession of the premises. The answer avers that they have filed an answer to the complaint and incorporate by reference all the allegations of the answer to the complaint in their answer to the plaintiffs petition, and pray that the allegations of the answer to the complaint be considered by the court in determining whether a receiver be appointed.

The answer to the complaint which is incorporated in the answer to plaintiffs' petition for the appointment of a receiver avers substantially as follows: that plaintiffs are not the owners of an undivided one-half interest in the premises involved herein; that plaintiffs should be divested of their interest in said premises, if any, acquired by them by reason of the wrongful issuance and recording of a certain trustee's deed dated December 11, 1945; that on or about April 12, 1945 Homans and plaintiffs purchased the premises; that the rights and obligations of the plaintiffs, Homans and the Trust Company of Chicago, a corporation, as trustee, with respect to the premises were fully set forth in a trust agreement attached to the answer to the complaint and is marked Exhibit A; that under the terms of said trust agreement said trustee agreed to hold title to said premises for the uses and purposes and upon the trusts therein set forth, and plaintiffs, as joint tenants, were therein declared to be entitled only to the earnings, avails and proceeds of said premises as to an undivided one-half interest: that to circumvent the provisions of said trust agreement plaintiffs unlawfully confederated, conspired, connived and colluded with each other and with said trustee through its trust officer one

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S. A. Stamberg for the purpose of having said trustee issue a deed to plaintiffs conveying to them an undivided one-half interest in said premises, contrary to the terms of said trust agreement; and that by reason thereof the said trustee did on December 11, 1945 execute and deliver to plaintiffs a deed conveying to them an undivided one-half interest in and to said premises, contrary to and in violation of the terms of said trust agreement which were then well known to plaintiffs and to said trustee. Further answering, Homans deny that no other person or persons than the parties mentioned in the complaint have any interest in or to said premises, and state the fact to be that said premises are occupied by the following named persons (naming 304 of the alleged tenants) as tenants.

Homans' theory of the case as set forth in their brief is (1) that plaintiffs are not entitled to partition, as they obtained by fraud a deed to an undivided one-half interest in the property herein involved; that the inequitable conduct of plaintiffs stands admitted by the pleadings; (2) that the partition suit must fail because of lack of necessary parties; (3) that the complaint did not allege any facts warranting a dissolution of the partnership, nor did it pray for a dissolution of a partnership between plaintiffs and the Homans, and the complaint did not allege any facts warranting the appointment of a receiver, nor did it pray for the appointment of a receiver; and (4) mere disagreement between partners does not warrant the appointment of a receiver, and the appointment of the receiver was contrary to the law and the facts.

In support of their first point Homans' maintain in their argument that the new matter alleged in their answer to the complaint to which no reply had been filed by plaintiffs when the hearing was had on January 11, 1946, is deemed admitted under Section 40 of the Civil Practice Act. The alleged new matter is

S. A. Stamberg for the jurpose of having said trustee issue a deed to plaintiffs conveying to them an undivided one-malf interest in said oremises, contrary to the torms of said trust ogreement; and that by reason thereof the said trustee did on december 11, 1945 execute and caliver to plaintiffs a seed conveying to than an undivided one-half interest in and to note premises, convery to and in violation of the terms of said trust agreement which were then well known to desirtles and to said trust agreement which answering, forms deny that no other person or occsens than the parties mentioned in the condition have any interest in or to said premises, and state the vest to the condition of the research that the said premises, and state the vest to the condition of the following named areas (mosts like of the alleged coupled by the following named areas (mosts like of the alleged tenants) as tenants.

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that plaintiffs acquired their interests "by reason of the wrongful issuance and recording of a certain trustee's deed": "that under the terms of the trust agreement said trustee agrees to hold title to the said premises for the uses and purposes and upon the trusts therein set forth"; that "plaintiffs unlawfully confederated. conspired and colluded with each other and with the trustee": that "the said trustee did . . . . execute and deliver to plaintiffs a deed . . . . contrary to and in violation of the terms of the trust agreement." No facts are stated in the answer to show the wrongful issuance of the deed to plaintiffs, nor do the facts and circumstances appear which constitute the fraud and conspiracy. Standing by themselves, these allegations are mere conclusions of law. (Aaron v. Dausch, 313 Ill. App. 524, 533; Randall Dairy Co. v. Pevely Dairy Co., 274 Ill, App. 474; Illinois Minerals Co. v. McCarty, 318 Ill. App. 423, 434; Nichols Illinois Civil Practice, Vol. 2, Sec. 777.)

The averment in the answer that plaintiffs' deed was issued "contrary to and in violation of the terms of the trust agreement" is a conclusion of the pleader as to the legal effect of the provisions of the trust agreement. In our opinion no inferences of inequitable conduct can be drawn from plaintiffs' failure to reply to the foregoing allegations of the answer.

With regard to the second point urged by Homans, in

Boddiker v. McPartlin, 379 Ill. 567, substantially the same contentions were made concerning the alleged lack of necessary

parties as in the case at bar. There the court said, at page 575:

<sup>&</sup>quot;Defendant has not been prejudiced by the nonjoinder of 'persons' in possession and judgment creditors of bondholders. If it later develops that any other parties are interested in the premises plaintiffs can make them defendants pursuant to section 26 of the Givil Practice act."

that plaintiffs acquired that interests "by reason of the proneful lesuance and recording of a certain trustas's dead"; "that under the terms of the trust expression blas diameters tout odd to serve odd to the said oreu one second the seau out not seelsed dies and of therein set forth"; that "stringift unlewfully contenent, conspired and colluded with a ch other ent wish the tructer": thet string to od avisor bur absence . . . . Old estebut bica add a deed . . . contrary to ref in wichriten of the turns of the trust sgreenent. " No feater are show the energy to the energy to wrongful issuance of the deed to blaintiffe, acr so the sold and circumstances eppear which constitute the finer as large in er. Btanding by themselves, these giles, those are a conclusions of law. (Agron v. wuser, 311 T.A. Agn. 504, 58; notel siry s. v. Povely Dairy Co., 274 ill. in. '74; illiest winerite to. v. Magarty, 318 Ill. or. 422, AZV; Firmel Indiana until eratioe, Vol. 2. Sec. 777.)

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<sup>&</sup>quot;Defendant has not been prejudiced by the nonjoinder of 'nercous' in possession and judement oreditors of bondholders. If it later develops that any other perties are interested in the premises plaintiffs can make them lefendants oursunt to section 28 of the Civil Practice act."

In their answer Homans name more than 300 tenants as occupants of the premises but no reference is made to the nature and character of their tenancy. Whether they were transient guests moving from day to day or bound by leases for a definite term does not appear from the answer. Manifestly, naming all of the guests of a large hotel as parties defendant in a complaint for partition is not only extremely difficult but in most instances futile, since the guests are constantly changing. Many of those named in the complaint when the suit is filed would necessarily have to be dismissed on the ground that they had no interest "in possession or otherwise" and the new guests added as parties defendant. This at best would be an interminable process, As pointed out in the Boddiker case, Homans cannot be prejudiced in the instant case by a delay in joining the tenants until after plaintiffs' right to partition is determined.

Defendants urge as their third point that the complaint did not allege any facts warranting the appointment of a receiver nor did they pray for the appointment of a receiver. The bill contains a prayer for general relief and was later supplemented by a petition for the appointment of a receiver. The bill as well as the petition alleges many acts of misconduct by Homans in the operation of the hotel. In the case of Reliance Bank & Trust Co. v. Dalsey, 263 Ill. App. 546, it is held that a prayer for general relief is sufficient to warrant the appointment of a receiver pendente lite before the hearing, We do not think that Homans' position on this point is tenable.

As to Homans' final contentions, the evidence shows that the plaintiff B. R. Mancou had exclusive management of the hotel until December 8, 1945; that he collected all the rents, and that there was a monthly income of \$12,000; that he bought all the furniture; when the hotel was purchased a bank account was opened at the

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As to Homens' final contentions, the evidence shows that the plaintiff 5. R. Mancou had evaluative management of the hotel until December 8, 1945; that he collected all the rents, and that there was a monthly income of (12,000; that he bought all the furniture; when the hotel was purchased a bank account was opened at the

American National Bank in the name of "The Bennington"; that a number of other bank accounts were opened by Mancou and subsequently closed by Sam Homan; that some time before the Homans evicted plaintiffs, Sam Homan came to the hotel at night and wrote checks against the hotel account; that on other occasions he took money from the eash register; that on December 8, 1945 Homan came to the hotel about 8:15 o'clock in the morning accompanied by "two short white gentlemen and two tall colored gentlemen." Homan testified that "I went with bodyguards expecting trouble; I wanted to protect my life, health and happiness; I got into the inner office by breaking the panel of the door."

From a reading of the record there can be little doubt that the conduct of Sam Homan for several months prior to the appointment of the receiver caused a serious disruption of the operation of the hotel which resulted in injury to plaintiffs. The evidence amply justified the chancellor in appointing a receiver to protect and preserve the premises.

For the reasons stated, the order of January 11, 1946 appointing George Denison receiver of the premises in question is affirmed.

ORDER AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

American National Bank in the name of "The desnington"; that a number of other bank accounts were coeded by hencou and subsecuently closed by Bam Homan; that some time before the Homans evicted plaintiffe, Sam Homan came to the hotel at night and wrote checks against the hotel account; that on their occations he took money from the cach register; that on Pacember 3, 1940 Homan came to the hotel about 8:16 o'clock in the morning proposatied by "two short white gentlemen and two tall colored gentlemen." Foman testified that "I went with bodyguards expecting trouble; I wanted to protect my life, health and hepoinems; I got into the laner office by breaking the panel of the door."

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For the remands stried, the order of January 11, 1946 appointing George Demison receiver of the premises in cus tion is affirmed.

. LAW LEW ADJECT

KILEY, P.J. AND BURKE, J. CONCUE.

43339

PEOPLE OF THE STATE OF ILLINOIS ex rel. FLORENCE L. KLOPFER and HENRY KLOPFER,

Appellants,

V.

CITY OF CHICAGO, a Municipal Corporation; EDWARD J. KELLY, Mayor of City of Chicago; JAMES P.
ALLMAN, Commissioner of Police of City of Chicago; OSCAR E.
HEWITT, Commissioner of Public Works of City of Chicago; L. M.
JOHNSON, Commissioner of Streets and Electricity of City of Chicago; WALTER WRIGHT, Superintendent of Parks, Recreation and Aviation of City of Chicago; and ARNOLD MERBITZ and WILFRED D. BYRNE, doing business as M. B. MOTORS,

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

20 I.A. 671

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

By their second amended petition (hereinafter for convenience referred to as petition) relators sought a writ of mandamus to compel the defendants in their respective official capacities and Arnold Merbitz and Wilfred D. Byrne, doing business as M. B. Motors, to remove certain automobiles, other vehicles, advertising signs, electric-light fixtures and other appurtenances used by M. B. Motors for the conduct of their secondhand automobile business on property alleged to be a public parkway on the south side of East 78th street between Stony Island avenue and the north-and-south alley east thereof, in violation of law. Answers were filed by the city, its designated officials and by the individual defendants, certain portions of which were stricken by the court. Trial of the cause resulted in a denial of the petition for a writ of mandamus and the dismissal of defendants, from which relators appeal.

Relators adduced competent and uncontroverted evidence to show that in 1875 and later in 1914 there were public

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OFFY O. CHICARO, a Manicipal derpor tion; D. A. A. L. L. L. C.
of City of Chicago; Jales B.
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and Fleetricity of Chicago; L. S.
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of City of Thiores; and I.O.
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APPEAL FIGHT

MR. PRESIDING JUSTICA SMINNO ORLEVISOR SER OFIRION OF INS CORE.

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dedications of East 78th street, including that portion extending from Stony Island avenue in an easterly direction to and beyond the alley directly east thereof. Subsequently, in 1916, a paving ordinance established 78th street as 26 feet wide. The street being dedicated as 66 feet in width, it would extend 33 feet in each direction from the center of the roadway. The evidence further showed that the distance from the center of the roadway to the curb was 13 feet; that immediately to the south of the curb is a sidewalk six feet wide, so that from the center of the roadway to the south end of the sidewalk is a total of 19 feet; and that the 14 feet immediately south of the sidewalk constitutes a parkway which, in turn, is a part of the dedicated East 78th street.

The only structure in the area on the south side of East 78th street from Stony Island avenue to Cornell avenue, the first street to the east, is a large apartment building situated adjacent to and immediately east of the alley running between the two north-and-south streets. The sidewalk in front is six feet wide with a distance of 14 feet from the southerly line of the sidewalk to the north face of the building. At this point the sidewalk immediately joins the south curb of East 78th street. Also on the south side of East 78th street and in the area immediately west of the same alley, the 14 feet immediately south of the sidewalk is unimproved, and the only occupancy of the 14-foot strip is that of the defendants, M. B. Motors, for display of their automobiles for sale to the public and the maintenance of electric-light poles and advertising signs. The polls erected by the individual defendants are about 10 to 12 feet high, 30 to 40 feet apart, with electric-light wires containing 20 or 30 bulbs illuminated and maintained by M. B. Motors.

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On December 23, 1943 a notice was served on defendants which referred to the council order and called attention to the fact that said strip of land is a public parkway, and that it had been used for some time by M. B. Motors for storage of automobiles for sale to the public; that such use for private gain automatically excluded the use thereof by the general public and was inimical to the public interest; that the demand was made on behalf of Florence and Henry Klopfer, as taxpayers and residents of the City of Chicago; that Klopfer had appeared before the committee on local industries, streets and alleys to object to the use of said public parkway for private gain, and had written letters to the city officials with respect thereto; and said notice made a demand upon the defendants charged by law with the duty and responsibility of protecting and safeguarding the public interests and public parkways, for the revocation of the permit theretofore granted, and for the immediate removal of the automobiles and other vehicles so stored by M. B. Motors as constituting a public nuisance and purpresture upon a public parkway, and the notice further

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advised defendants that if the demand were not heeded, relators would, within five days, take appropriate steps to enforce the removal in the public interest.

On December 29, 1943, after the foregoing notice had been served, a motion was adopted by the city council to reconsider the vote by which the permit had been granted to M. B. Motors, and to rerefer the order to the committee on local industries, streets and alleys. That motion was still pending at the time of the trial, no further action having been taken thereon.

It appears from the evidence that despite these circumstances M. B. Motors has continued to occupy said strip of land, has erected thereon posts and poles as heretofore described, to which are attached huge advertising signs setting forth the business in which M. B. Motors is engaged, and appurtenances which illuminate the signs, has paved the strip with small white stones, and stored and displayed thereon used automobiles for sale, and that the officials of the City of Chicago have not ordered M. B. Motors to remove said property and are permitting it to occupy and continue to use it for the purposes indicated.

Defendants in their joint brief interposed the twofold defense that (1) relators failed to establish their right to the writ of mandamus, and (2) the doctrine of unclean hands precluded them from obtaining the remedy sought. There is no merit whatever to the first defense. Relators introduced plats showing that East 78th street was dedicated in 1875 and 1914, that the dedicated portions extended from South Stony Island avenue in an easterly direction to and beyond the alley directly east thereof, that the city accepted said dedication and adopted ordinances establishing the width of the roadways and sundry streets, including 78th street at the point in question, from

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which it appears that the dedicated street was 66 feet in width and that the distance from the center of the roadway to the curb and over the sidewalk to the lot line were as heretofore stated. Klopfer supported the documentary evidence by oral testimony which was uncontroverted. The court in its oral opinion entertained some doubt as to the dedication, but the law is clear that the acknowledgment and recording of a plat in accordance with the statute, showing streets and alleys therein, operate effectually as a deed conveying title to the streets and alleys to the city. Corbin v. B. & O. C. Term. R. R. Co., 285 Ill. 439. Nor does the law require that evidence of title to the land platted be produced; the fact of platting and acknowledging are acts and evidence of ownership (Waugh v. Leech, 28 Ill. 488); and the acknowledgment and recording of such plat constitute a conveyance in fee simple of such portions of the premises platted as are marked or noted as donated or granted to the public, and the premises intended for streets, alleys, ways or other public use are held in the corporate name in trust and for the uses and purposes set forth or intended, namely, for public use as a public way (ch. 109, par. 3, Ill. Rev. Stat. 1943). When relators introduced in evidence survey plats properly recorded and acknowledged, showing the creation of a 66-foot public street known as East 78th street directly east of Stony Island avenue, defendants interposed no objection thereto, and the exhibits were admitted in evidence. They include the parcel of land in controversy, and under the provisions of the statute and the foregoing authorities, this constituted a proper dedication. Moreover, the dedication was accepted by the City of Chicago. In Needham v. Village of Winthrop Harbor, 331 Ill. 523, the court held that approval of a plat by a village was evidence that it complied with the

which it is ears that the dedicated street it. I feet in width and that the distance from the content of the reading to the cure that over the side at the lot line were : s heretofose standing. .lopfer supported the cosmontery dence by oral be: Jamony which was wearbridge lie court in its cral opinion enturbained some ould or to the Police tion, lat the law it alone that the tall actions of the resording of a plat in accordance which it a think, showing ತಿರಿತಾಗಿ ಬಿಡಿಗಳ ಸಿಸಿದಿಗಳು ಕ್ರಿಗೆ ಅಂತ್ರ ಕ್ರಿಗೆ ಬಿಡಿಗಳ ಜನೆಗಳ ಪ್ರಾಂಟಿ ಬಿಡಿಗಳ ಜನೆಗಳ ಪ್ರಾಂತಿ ಪ್ರಾಂತಿ ಪ್ರಾಂತಿ ಪ್ರಾಂತಿ converging title to do plue to and allega to the ditp. Scrbin v. T. ... Carbin v. T. 429. does the low repairs took tours of title to the Land plotfood be produced; the factor of the also as controlledging are sets and evidence of our rads (harden, facety as III. 400); and the solucidedgrant in recording of sain plat consaid to conveyon the the letter to care portions of all the Petra un vo fet mon an beton so b soult oue as bettell ancimous to the pathors and believed a parameter that eathful only of ar ourse of actives of the professional car can expense in active to figuredure to the transfer of a cooperate for a sear of the contract of the search namely, for rulid use as a self were (oh, 10), par. By Ill. Nev. tet. 1943). Then red toru introduced in cridence curvey plats properly recommended being losses; ; showing the creation of a Su-fout pu the street mown as her 78th street unrecthy east of Stony Island evenue, defendents interposed no object tion thereto, and the exhibits were consisted in evidence. They include the parcel of land in controversy, and under the provisions of the statute and the Corsgoing authorities, this constituted a proper dedication. Morsover, the dedication was accepted by the City of Chicago. In Meedham v. Village of Winthrop Marbor, 331 Ill. 523, the court held that approval of a plat by a village was evidence that it complied with the

statute. Such approval was had in the instant proceeding. It is suggested, however, that because the city did not improve all of the street there was no acceptance of the dedication. Kennedy v. Town of Normal, 359 Ill. 306, and McDonald v. Stark, 176 Ill. 456, are authority for the proposition that a municipality will be deemed to have accepted all the streets and alleys of a subdivision where it accepts the most important streets or major portions thereof and evinces no intention to refuse to accept any of them. Furthermore, acceptance may arise by express act, by implication from the acts of its officials, or user by the public for the purposes for which the property was dedicated (4 McQuillin (1943) on Municipal Corporations 773); and the paving and maintenance of a street has been held to be an act of acceptance (1 Elliott on Roads and Streets, p. 195, Consumers Co. v. City of Chicago. 268 Ill. 113, Village of Winthrop Harbor v. Gurdes. 257 Ill. 596, Kimball v. City of Chicago, 253 Ill. 105). In the case at bar the roadway had been paved and improved and is used by the public, and under the decisions cited, acceptance cannot be only as to that portion occupied by the sidewalk and roadway. but as to the entire 66-foot strip of land shown on the plats as dedicated to the public for use by the public as a street and way.

The second defense interposed is that the writ of mandamis is an extraordinary remedy, the issuance of which lies in the sound discretion of the court, and that in view of Klopfer's attempt, as defendants characterize it, to "freeze out" M. B. Motors, his business competitor, the court was justified in exercising its discretion adversely to the relators. As stated in the opening paragraph of this opinion, certain portions of the answers were stricken. The stricken material related to the defense of unclean hands. Notwithstand-

statuto. Inch composed was an in one ins proceedings. It is an earled, herever, that browned the sitte and improve all of the atreet there was no see from af the and then I when you do good to be the out of and Monorary v. Damie 170 111, Sous are abliced to the Set jes od com. The constant allo jabladadana a dade noitiacopore adantes then it had bylades a to synthe her absordered its acomina sina io - 10 embiros político adendir unideográficam de est no intensition to make no many agency of the intermedely coordinate may arise by the area of the first that the target of cotto of 100 cm and a mean in the problem will be ever for then the property as confucted the a clima the en Manieirel Jewer Gione (1994) en voe pring tot of historium of Creatist file of the common of the best more and secure a on Trockia and Charles of Alley 1991, 1992, 1992, 1992, 1992, 1992, 1992, 1992, 1992, 1992, 1993, 1993, 1993, 19 affil The age have and with the the to the fifth of the too at bear the routes, into some parel and in seven that the ared by the jurille, the unrest the cost functions of the property conserved has only as to that pertion occasion of the classific at postings but as to the altime co-journers, or Irmi them on the plate desada a co elia pelliga com la collegada de hadrellada ca LOS BOST

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ing this fact the court indicated that in his opinion this appeared to be a "spite case," and defendants still persist in alluding to the motive which prompted relators to institute proceedings. The doctrine of unclean hands has no application to the case at bar, because the performance of a duty to the public cannot be refused on any such basis. In <u>Hummelshims</u> v. Hirsch, 114 Md. 39, 79 Atl. 38, the court held that where a writ is sought to compel the performance of a duty to the public, the writ should not be denied because relator is actuated by personal ill-will in filing the petition.

At the instance of the court the relator gave his reasons for bringing the suit. He testified that he owned considerable property within the square block within which the premises are located, that he is a taxpayer, paying his taxes promptly, and maintains his various enterprises within the lot lines. We find no validity to the defense of unclear hands, especially in view of the fact that the subject matter relating thereto was stricken from the answer and thus eliminated from the proceeding.

For the reasons indicated the judgment of the trial court should be reversed and the cause remanded with directions to issue a writ as prayed, and it is so ordered.

JUDGMENT REVERSED AND CAUSE REMAIDED WITH DIRECTIONS TO ISSUE A WRIT OF MANDAMUS AS PRAYED.

Scanlan and Sullivan, JJ., concur.

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ELLEN HOLT,

Appellant,

V.

CHICAGO HAIR GOODS CO., an Illinois corporation,

Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant on the finding of the court, in an action of forcible detainer to recover possession of premises in the City of Chicago, described as the south one-half of the fourth floor, known as 2635-45 South Wabash Avenue. Defendant was in possession under a written lease at a monthly rental of \$200.00, payable in advance, the lease to expire August 51, 1945. The premises were used for storage purposes. Philip F. W. Peck was agent for the plaintiff owner. His offices are at 506 South Wabash Avenue. Robert D. Smith was his leasing manager. Morris L. Goldstein was president of the defendant company, and Nathan L. Goldstein, secretary and treasurer.

Prior to the expiration of the lease, negotiations were opened by the agent of plaintiff and defendant for the execution of another lease. Smith says the conversations began in June, 1945. Morris Goldstein says the first conversation was some time in August. Goldstein and Smith agree it was at the office of defendant. Whatever the time, the witnesses also agree the agent of the owner asked \$450.00 per month rental for a renewed lease; that Mr. Goldstein said in substance defendant could not and would not pay that much rent. Smith says: "I finally told Mr. Goldstein we would give him a thirty-day extension of his present lease, from September 1 to September 30." Mr. Peck testifies to a similar conversation between him

ELLEW HOLT,

Appellent,

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OHIDAGO MAI BOUDE CO., en Illinois corporation, Abbellee.

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Illinitiff appeals from a jaigment for desendant on the finding of the court, in an action of foreible detainer to resover possession of the fauthers in the City of Citoago, described as the south one-half of the fauth floor, insun an 2025-e5 South Mebash Avenue. Lefendant Las in possession as en 2025-e5 whitten lease at a morthly rental of Law. OO, nayable in the constitution lease to errino flucust 31, 1065. The premise were used for storage murposes. Philip s. 1. Fest was event nor the plaintiff ormer. His offices are at 5% bouth Tabaya Avenue. Pobert D. Smith mas his loseibr an arms. No sis is solisten was president of the defendent no many, and athen in Goldstein was president of the defendent no many, and athen in Goldstein.

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and Goldstein. He says: "I also spoke to him about the lease and he said he would like to have an extension and I said we would give him thirty days more and he said, 'Is that all you can give me?! I said, 'That's all, up to---! I said, 'We'll give you up to the 30th of September' and, 'Well,' he said, 'if that's all that's all then' or something like that." Cross-examined, Mr. Peck said: "I told Mr. Goldstein the best I could do was to give him thirty days and he said 'If that's all you can give me, I guess I can't do anything about it'. I told him we would have a lease made out and forwarded to him. " Morris Goldstein says Smith said to him: want it you can stay there in the meantime and I'll negotiate with the landlord". He says: "I said to him (Smith), 'try and get me at least six months time and then I'll be able to make arrangements to move that stuff', and he said to me he will try to do it." Goldstein further says: "Mr. Smith or anybody else did not talk to me about this thirty day lease. He didn't talk to me exactly about a thirty day lease but told me the landlord will not give me another year but if they rent the place, until they rent it we can stay in the meantime for a certain time."

On this vital point of whether there was a verbal agreement for a thirty-day extension of the lease, we have the testimony of Peck and Smith against the testimony of defendant. The preponderance seems to be in favor of plaintiff. The witnesses for her narrate the more probable story and are corroborated by facts in evidence establishing plaintiff's theory.

Smith prepared a loft lease from the owner to defendant for a term beginning September 1st and ending September 30, 1945, at a rental of \$200.00 per month. The leases are in the record and were mailed to defendant from Peck's office with a letter dated August 30, 1945. The letter was also mailed on that date.

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It said:

" \* \* \* The enclosed lease is for one month from September 1st to September 30th, 1945, with a ten (10) day mutual termination clause, and is at the same rate you are now paying.

\* \* \* You will note that the lease provides that we have the right to show these premises at any time to any prospective new tenant and we expect to avail ourselves of this privilege.

Will you also affix your corporate seal to both copies and along with letter return same to our office immediately for signature.

Very truly yours, Philip F. W. Peck, Agent."

On the next day, August 31, 1945, defendant mailed its check for \$200.00 to the order of plaintiff's agent, addressed to his office. There was a notation on the check: "Sept. 1945 Rent". The check was put through the bank by plaintiff's agent September 10, 1945, and before any reply from defendant had been received. The letter of Peck with the duplicate leases for thirty days was received and at once sent, by order of defendant's president, to the attorney for defendant. The envelope in which it was received was destroyed at the office of defendant.

Beptember 12, 1945, plaintiff's agent wrote defendant, "Attn. Mr. Nathan L. Goldstein, Secretary and Treas.":

"Under date of August 30th, 1945, I forwarded to you lease for thirty days from September 1st to September 30th, 1945, covering the South half of the fourth floor of the building at 2635-45 South Wabash Avenue, Chicago, Illinois, at a rental of Two Hundred Dollars (\$200,00) for the period of the lease. This lease was sent you after our negotiations for a, longer term lease had failed and was in accordance with our verbal understanding that we would give you an additional thirty days in the premises.

Up to this writing, we have not received the signed lease from you, but we have received your check for \$200,00 in payment of the rent under this lease. Will you kindly forward at once the signed lease, as we wish to get this matter disposed of? Please give attention also to the other matters contained

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" \* \* \* The enclosed lesse is for one month from Beotember let to September 30th, 1945, with a ten (10) day mutual termination clause, and is at the same rate you are now paying.

\* \* Now will note that the lesse provides that we have the right to snow these premises at any time to any prespective new tenant and we expent to avail ourselves of this privilers.

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CERTIFY FIRST FIRST

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On the next day, august 31, 1845, defendent malled its check for \$200.00 to the order of plaintiff's sent, addressed to him office. There was a antation on the sheet; "Sept. 1845 went". "To check was put through the time by olaintiff's agent September 10, 1845, and before may raply from defendant had been received. The latter of the vith the duplicate leaves for thirty lays was received and ut older, by order of defendant's president, to the altonary for defendent. The envelops in which it can received and use defendent. The envelops in which it can received and use descriped at the office of defendent.

September 12, 1946, plaintiff's a not wrote defendant, "Attn. Mr. Nathan L. Golderein, Secretary and Press.":

\*Under date of sugget SUT\*, 1945, I firstled to you leade for telrty days from deptember let to September 50th, 1945, covering the South issif of the fourth floor of the building at SOSE-45 South Wabach Avenue, Chicago, Illinois, at a rental of Two Hundred Dollars (\$500.00) for the period of the Hundred Bollars (\$500.00) for the period of the lease, This lease was sent you after our negotiations for a, longer term lease had failed and was in accordance with our verbal understanding that we would give you an additional thirty days in the premises.

Up to this writing, we have not received the signois lease from you, but we have received your check for \$200.00 in payment of the rent under this lease. Will you kindly forward at once the eigned lease as we wish to get this matter disposed off Flense give attention also to the other matters contained

in our letter of August 30, 1945.

Very truly yours,
Philip F. W. Peck, Agent."

This letter was sent to defendant by registered mail, directed to its office. The receipt of the defendant was mailed September 13, 1945, and is in weldence. It shows with accuracy the possible speed with which a letter from one office to the other could be delivered by mail. Again there was no reply.

These letters, the leases, the check of defendant with notation it was for September rent, the destruction in defendant's office of the envelope in which the leases were enclosed, the failure of defendant to reply to the agent's letters, we hold, establish the existence of a new lease for thirty days, ending on September 30, 1945, beyond a reasonable doubt.

Having found the facts to be as above stated, the legal problem is not difficult to dolve.

Defendant argues his cause on two theories. First, that by holding over a new tenancy was created for a like term as under the old lease. The facts are wholly inconsistent with any such inference. Defendant cites Weber v. Powers, 213 Ill. 370, 382. The case is clearly not for, but against it. The opinion says:

"While the legal presumption of a renewal of the tenancy from the holding over of the tenant cannot be rebutted by proof of a contrary intention on the part of the tenant alone, it can be rebutted by proof of a contrary intention on the part of the landlord alone, or on the part of both parties."

There is no doubt here the landlord had no intention that the holding over of defendant should create a new tenancy on the terms and conditions of the old lease, and it is quite clear defendant also understood perfectly that this

in our lette of auguste30, 1945.

Yory truly yours,

Philip F. M. Prok, Agent."

This letter was sent to defendant by rockstered unil, directed to its office. The receipt of the defendant was mailed September 13, 1046, and is in evidence. It shows with accuracy the possible speed with which a letter from one office to the other could be delivered by mail. Again there was no reply.

These letters, the leases, the draft of defendant with notation it was for decknoor rent, the destruction in defendant's office of the envelope in whoh the leases were enclosed, the failure of defendant to reply to the exent's letters, we hold, establish the existence of a new lease for thirty days, ending on esptember 50, 1945, beyond a reasonable doubt.

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Defendent argues his cause on two theories. First, that by holding over a new tenancy was erseted for a like term as under the old lease. The facts are wholly incompletent with any such inference. Defendent cites deber v. Powers, 213 Ill. 270, 262. The case is clearly not for, but against it. The opinion says:

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There is no doubt here the landlord had no intention that the holding over of defendant should create a new tenancy on the terms and conditions of the old lesse, and it is quite clear defendant also understood perfectly that this

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was not the intention of the landlord. In <u>Condon</u> v. <u>Brockway</u>, 157 Ill. 90, the Supreme Court said:

"Where a tenant for a year or for years holds over after the term expires, without any new agreement, the landlord, at his election, may treat such tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease. But no such right of election belongs to the tenant. (Clinton Wire Gloth Co. v. Gardner, 99 Ill. 151; Keegan v. Kinnare, 123 id. 289)."

To the same effect is <u>Woodstrom</u> v, <u>Freeman</u>, 159 Ill. App. 340, 342.

Defendant's second theory is that the facts as proved created a tenancy from month to month, which would require notice of thirty days to terminate. No thirty day notice was served on defendant here. On oral argument defendant declined to say which of these two theories it relied on. We hold the second untenable as is the first. It is quite true the mere tender of a lease, unsigned and unaccepted by the tenant lessee, would not be binding on the lessee. It was so held in Walsh v. Fallis, 266 Ill. App. 341, and in other cases cited. The present case is, however, quite distinguishable. True, if a tenancy from month to month was created, thirty days' notice by the landlord would have been necessary to terminate it. Ill. Revi Stat., 1945, Chap. 80, \$6; Schilling v. Klein, 41 Ill. App. 209, 210. The holding over here was not by agreement of both parties. The tenant could not on September 1st create a tenancy from month to month by holding possession of the premises, while also holding in his hands a new lease which, though unsigned, showed clearly this was not the intention of the landlord. Here, the defendant received the leaseb unsigned, placed it in the hands of his lawyer, did not reply to the letter or return the leases, but sent a check for the September rent for the amount named in the new lease, which was also the amount paid under the old one. This may have

ram not the intention of the landlord. In denden . rockny, 187 Ill. 90, the Supreme Court maid:

Where a tement for a year or for years holds over after the tem sapthes, without any near arreament, the landlord, we his election, may treat such temant as a treaperter, or as a tenant for another year, used the same to the original lause. But no test item that of election belongs to the tenant. (Clinton income to the tenant. (Clinton income to the tenant. (Clinton income to the tenant.)

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been clever but could not create a tenancy other than that provided for in the proffered written lease.

The judgment will be reversed and the cause remanded with directions to enter judgment for the plaintiff and in due course issue a writ of restitution on the judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and Niemeyer, JJ., concur.

been clever but could not ensute a tenancy other than there provided for in the proffered whithen leage.

The judgment will be reversed and the seums relation with dissortions to eview judgment for the obviousiff and in due course tarne a smit of restitution on the judgment.

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O'Connor and Heleyer, J ., conour.

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GIOVANNI FIORELLA,

Appellant,

V.

LOUISE FIORELLA,

Appellee.

APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing his complaint for divorce, sustaining defendant's cross-complaint for separate maintenance, awarding her \$19 per week for the support and maintenance of herself and four minor children and directing that plaintiff pay defendant an additional sum of \$50 for attorney's fees.

The parties were married in 1912; six children were born, four of whom were minors at the time of the trial. December 1943 plaintiff filed his complaint alleging desertion by the defendant in October 1937; defendant answered denying the charge of desertion, and in her cross-complaint, filed in May, 1944, for separate maintenance charging plaintiff with cruelty, alleges "That 12 years ago the said cross-defendant left said cross-plaintiff after the Sourt had placed him on probation for striking said cross-plaintiff. Plaintiff admits striking the defendant, and testified that in March, 1931, the last act of cruelty found in the decree, he struck the defendant, was arrested, found guilty, paid a \$25 fine and was put on six months probation; that he then left his wife. Defendant and her daughter testified that after the court proceeding and the placing of plaintiff on probation the parties have lived separate and apart.

Plaintiff contends that because of the allegation in the cross-complaint that plaintiff left defendant twelve

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GIOVANNI FIORELLA, Appellant,

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LOUISE FICEWLLA,

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A. Justich Biranium Denivado Mi Contact Programme

Plaintiff amposts "row a verse itemically all complete for liveroe, sustaining defen and a cover-complete for separate maintenance, so with the life our verb for the colorate and maintenance of herself and tour minimises, or directing that alaintiff may defend of the editional are storages for sitoracy of fees.

The parties of the fifth of the nettraction born, four of whom were almore as the time of the coins. December 1945 of Lintiff filed like e milled mileste to december and selendant in vertical 1971; stander to tendental manual feet line the charge of describing and in his conso-corolitar, liled in May, 1944, for apparate paint may a contag place of with orughty, allewas "inst ld years ago the sold escended and of no who hearly has true that the Wiltelian fore here their probable for surface of the entering that the rot manded on striking the defendant, who this that I will, I let the last not of cruelty doubt is see dearch, an abrunk the defeat don't, were a rested, found guilty, paid a i. 5 fins ear u. a put on six wonths' probating that he fish left it wire. dant and her daughter tostified that after the court proceeding and the placing of plaintiff on probetton the parties have lived separate and apart.

Plaintiff contends that because of the allegation in the cross-complaint that plaintiff left defendant twelve

years before the filing of the cross-complaint, what they lived together for one year after the last act of cruelty and therefore cruelty was condoned. This position is untenable. The evidence clearly shows that after the acts of cruelty, committed in March, 1931, the parties have lived separate and apart.

The allowance to defendant for the support and maintenance of herself and four minor children is not excessive.

The decree is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

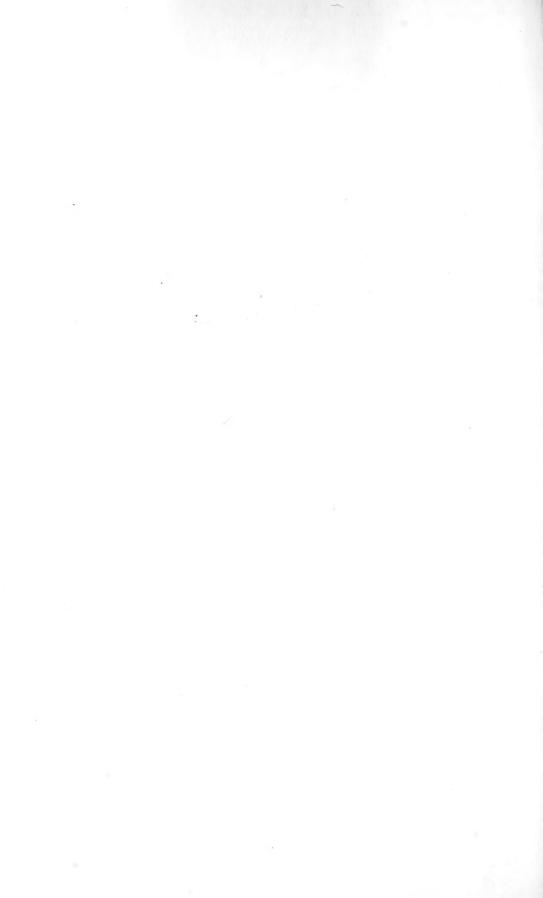
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